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REPORTS OF CASES

28

IN THE

SUPREME COURT

OF

NEBRASKA.

1881.

VOLUME XI.

BY

GUY A. BROWN,

OFFICIAL REPORTER.

LINCOLN, NEB.:

STATE JOURNAL COMPANY, LAW PUBLISHERS.

1881.

Entered according to act of Congress in the office of the Librarian of Congress,
A.D. 1881,

By GUY A. BROWN, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

Rec. Jan. 16, 1882

THE SUPREME COURT

OF

NEBRASKA.

CHIEF JUSTICE,

SAMUEL MAXWELL.

JUDGES,

GEORGE B. LAKE,

AMASA COBB.

ATTORNEY GENERAL,

C. J. DILWORTH.

CLERK AND REPORTER,

GUY A. BROWN.

DEPUTY,

HILAND H. WHEELER.

DISTRICT COURTS

OF

NEBRASKA.

JUDGES.

A. J. WEAVER,	FIRST DISTRICT.
S. B. POUND,	SECOND DISTRICT.
JAMES W. SAVAGE,	THIRD DISTRICT.
GEORGE W. POST,	FOURTH DISTRICT.
WILLIAM GASLIN, JR.,	FIFTH DISTRICT.
J. B. BARNES,	SIXTH DISTRICT.

DISTRICT ATTORNEYS.

W. H. MORRIS,	FIRST DISTRICT.
J. C. WATSON,	SECOND DISTRICT.
N. H. BURNHAM,	THIRD DISTRICT.
M. B. REESE,	FOURTH DISTRICT.
V. BIERBOWER,	FIFTH DISTRICT.
C. C. McNISH,	SIXTH DISTRICT.

SHORT-HAND REPORTERS.

P. E. BEARDSLEY,	FIRST DISTRICT.
OSCAR A. MULLON,	SECOND DISTRICT.
JOHN T. BELL,	THIRD DISTRICT.
E. M. BATTIS,	FOURTH DISTRICT.
F. M. HALLOWELL,	FIFTH DISTRICT.
EUGENE MOORE,	SIXTH DISTRICT.

The volume of laws quoted as the "Revised Statutes," or "Rev. Stat.," refers to the edition prepared in 1866 by E. ESTABROOK.

The volume of laws quoted as the "General Statutes," or "Gen. Stat.," refers to the edition prepared in 1873, by GUY A. BROWN.

Acts of various years are cited by a reference to the volume of laws of the year in which they were passed.

The volume of laws quoted as the "Compiled Statutes," or "Comp. Stat.," refers to the edition prepared in 1881 by GUY A. BROWN.

This volume contains a report of all decisions handed down prior to Nov. 12, 1881, not previously reported. Opinions handed down after Nov. 12, 1881, and at the January term, 1882, will appear in the next volume.

The syllabus of each case in this volume was prepared by the judge writing the opinion, in accordance with Rule XIV; the Index by the reporter, in accordance with the plan mentioned in his preface to Vol. 10 (though not abbreviated to the extent there suggested), with hopes of approval from the profession.

Lincoln, Dec. 1, 1881.

The following rule was adopted at the July Term, 1881.

RULE XVII.

In all cases where oral testimony taken on the trial, or by deposition, is brought to the Supreme Court for review, either by proceedings in error or appeal, the answers of witnesses in narrative form shall alone be included in the transcript, omitting all interrogatories except such as may be necessary to a correct understanding of the answers thereto, or on which error is assigned; and omitting also all remarks of counsel in argument when objecting to questions or answers, and of the judge in ruling thereon. Where unnecessary matter is included in the transcript, the costs thereby occasioned shall be taxed to the party bringing the same to this court.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1881.

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.
 " GEORGE B. LAKE, } JUDGES.
 " AMASA COBB, }

I. P. OLIVE AND FREDERICK FISHER, PLAINTIFFS IN ERROR,
 V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Constitutional Law.** By section eleven of the bill of rights, Constitution of 1875, all persons charged with crime are entitled to "a speedy public trial, by an impartial jury of the county or district in which the offense is alleged to have been committed."
2. ———: OF THE WORD "DISTRICT," AS HERE USED. The word "district," like the word "county," is here used in a restrictive sense, to limit and control the exercise of both legislative and judicial power in the punishment of criminal offenders. It is intended to designate the precise portion of territory or division of the state over which a court, at any particular sitting, may exercise power in criminal matters. And such division, by whatever name it is known in legislation, is co-extensive with,

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12	382
12	388
16	388
17	184
20	287
20	245
11	1
29	445
11	1
32	160
11	1
34	252
11	1
38	908
11	1
40	19
40	319
40	762
41	539
11	1
43	21
11	1
46	181
46	402
46	611
11	1
45	276
11	1
47	643
11	1
52	430
53	303
55	394
11	1
60	530
11	1
61	553

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and practically limited by, this constitutional provision, to that from which a jury, for the particular term, may legally be drawn.

3. ———: **POWER OF THE LEGISLATURE TO CREATE TRIAL DISTRICTS.** While the legislature doubtless may, in their discretion, by general law, create trial districts larger than a single county, yet, to be effective, such law must be accompanied by one under which jurors can be called from the whole, and not merely from a portion of such district.
4. ———: **DESIGN OF THIS CONSTITUTIONAL PROVISION.** The grand design of this constitutional provision seems to be to secure to the accused a trial by a jury from the vicinage where the crime is supposed to have been committed, so that he may have the benefit of his own good character and standing with his neighbors, if these he has preserved, and also of such knowledge as the jury may possess of the witnesses who give evidence before them.
5. ———: **POWER OF THE LEGISLATURE TO ORGANIZE NEW COUNTIES.** There is nothing in the constitution prohibiting the formation of new counties out of the unorganized territory of the state, of such form and dimensions as to the legislature may seem best.
6. ———: **EFFECT OF FORMING AND ORGANIZING NEW COUNTY OUT OF UNORGANIZED TERRITORY, FORMERLY PORTIONS OF TWO JUDICIAL DISTRICTS.** When a new county, formed by the legislature from "unorganized territory" taken from two judicial districts, becomes organized for county purposes, as the statute directs, it thereupon ceases to be "unorganized territory," and is entitled to all the rights and privileges, under the constitution, bestowed upon these governmental divisions of the state. Its territory is no longer divided between the two judicial districts, but is completely severed from both, and of necessity must so remain until the legislative duty of assigning it to one of them is performed. Under the constitution a county cannot be parts of two judicial districts.
7. **Statute Law: MEANING OF THE TERM "UNORGANIZED COUNTY."** By the term "unorganized county," in the act of Feb. 24th, 1879, "To authorize the judge of the district court to designate the county where an indictment may be found," etc., is meant simply a county which has not become organized for local government under the statute providing how that may be done. The act above referred to contemplates no such thing as a county unorganized "for judicial purposes," for when a

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county becomes organized under the law, it is so for all known purposes of civil administration—judicial as well as other.

8. **District Courts: OF THEIR CRIMINAL JURISDICTION.** A district court while sitting in one county has no jurisdiction over crimes committed in other organized counties.
9. **Change of Venue in Criminal Cases.** Under the statute, an application by a prisoner for a change of the place of trial is addressed to the sound discretion of the trial court, and unless an abuse of such discretion be clearly shown, the decision will not be interfered with. A motion for such change to a particular county is bad, and may be overruled for that reason alone.
10. **JURORS: COMPETENCY OF: IMPRESSION OF GUILT.** If it be shown by the *voir dire* examination of a juror that his mind is impressed so thoroughly with the idea of the prisoner's guilt that he cannot presume him to be innocent, and can only admit the "possibility" of his being so, it is good ground for challenge.
11. ———: **OPINION BASED ON NEWSPAPER REPORTS.** And if a juror have an opinion as to the guilt of the accused, even if based solely on newspaper reports, so fixed as to require evidence to remove it, he does not stand indifferent, and is subject to challenge, although he may believe that he can render a fair and impartial verdict on the evidence produced in court.
12. **Interested Witness: HIS CROSS-EXAMINATION.** Any interest that a witness may have in the result of the trial of a case in which he is testifying, whether pecuniary or other, may be called out on his cross-examination, as affecting his credibility.
13. **Cross-examination of Witness as to Identity of Prisoner.** A witness for the state who had testified, on his direct examination, to having seen a person he took for one of the prisoners near the place of the murder, on the evening preceding the night of its commission, was asked, on cross-examination, how long he had known him, and answered, "Since he has resided in Plum Creek." He was then asked, "How long has he resided there?" and "Have you known him well since he lived there?" These questions were both excluded on the ground of immateriality. *Held*, error.
14. **Refusal of Court to hear Argument.** The refusal of a court to hear argument of counsel as to the admissibility of evidence is not, *per se*, error.

15. **Examination of Witnesses: RULES RESPECTING.** A court may make reasonable rules respecting the examination of witnesses, but no rule can be upheld that arbitrarily dictates which of several attorneys, there being no disagreement between them, shall examine or cross-examine a witness, or that requires the same attorney who took part in the examination in chief to conduct the cross-examination.
16. **Good Character: EXAMINATION OF WITNESSES TO.** Where a person accused of crime introduces evidence of his good character or reputation, it is not competent for the prosecution, in reply, to put in evidence particular facts tending to prove it to be bad. But if particular facts be admitted, either with or without objection, the accused has the right to show the circumstances under which they occurred.
17. ———. Good character may always be proved in criminal cases, no matter how heinous the offense charged. Still it may occur that the crime is so strongly marked by deliberation and atrocity that if the jury are clearly convinced the accused was a party to it, his good character should not avail.
18. **Charge to Jury.** The charge to a jury must not be so worded as to be liable to leave upon their minds an impression that the judge believes the prisoner guilty; nor should it have a tendency to confuse or mislead them.
19. ———: **GOOD CHARACTER.** An instruction by which the jury are given to understand that, by reason of being indicted and put upon trial, the character of the accused "*has a stain or imputation*" cast upon it, and that his proof of good character was "to remove this stain or imputation," and to restore the character to its former state, is erroneous.
20. ———: ———. The purpose of evidence of good character is to disprove guilt. But if the accused offer no evidence of his good character, no legal inference can arise from such omission that he is guilty of the offense charged, or that his character is bad.
21. ———: **ACCOMPLICES.** A charge to the effect that while it is unsafe to convict upon the testimony of an accomplice alone, the jury were at liberty to do so if, on due consideration, they deemed it sufficient, *held*, not erroneous.
22. ———. A court is not required to multiply instructions, with changed phraseology, on a single proposition of law. One clear, pointed statement to the jury of each proposition advanced is sufficient.

23. **Verdict.** In a case of homicide a verdict finding the accused guilty under a count of the indictment charging death to have been produced "by means to the jurors unknown," will be sustained, although there was evidence before the jury which would have warranted them in finding it to have been produced either by hanging or by shooting.

ERROR to the district court of Adams county.

The plaintiffs in error were indicted at a special term of the court called in that county, commencing February 25, 1879, for the murder of Luther Mitchell on the 10th day of December, 1878, in the county of Custer. On the 24th of February, 1879, the legislature passed the following act:

"An act to authorize the judge of the district court to designate the county where an indictment may be found, and the person tried for any felonious offense charged to have been committed in any unorganized county or territory of this state, or in any county where no district courts are held, and to provide for the payment of fees and expenses incurred in the arrest and prosecution of such persons, and to repeal an act entitled 'An act to authorize the judges of the district court to designate the county where an indictment may be found, and the person tried for any felonious offense charged to have been committed in any unorganized county, or in any county where no district courts are held,' approved February 25, 1875.

"Be it enacted by the Legislature of the State of Nebraska:

SECTION 1. That it shall be lawful for the judge of any judicial district court within the state of Nebraska, where it has been made to appear to him that a crime has been committed amounting to a felony, within any unorganized county or territory, or in any county where no terms of the district court of this state are held, attached to or in his said district for judi-

cial or other purposes, to designate the county in his district wherein the alleged offense may be inquired into by the grand jury, and in case an indictment found, the person or persons so indicted, tried: *Provided*, nothing herein shall prevent the person or persons indicted, upon a legal and proper application, removing the trial thereof to some other county in the same judicial district; and, *provided further*, that all costs and expenses for the arrest and prosecution of such person or persons shall be paid out of the general fund of the state; and, *provided further*, that no bill for costs or expenses shall be audited and paid without the certificate of the presiding judge of said district, that said services have been performed, and that the account is correct.

"SEC. 2. Sections one and two of an act entitled 'An act to authorize the judges of the district court to designate the county where an indictment may be found, and the person tried for any felonious offense charged to have been committed in any unorganized county, or in any county where no district courts are held,' approved February 25, 1875, are hereby repealed.

"SEC. 3. There being an emergency for the taking effect of this act, the same shall take effect and be in force from and after its passage.

"Approved February 24, A.D. 1879"

On the 26th day of February, 1879, an order was made by the district judge, and entered of record, as follows:

Be it remembered, that on this 26th day of February, A.D. 1879, it having been made to appear to the Hon. William Gaslin, Jr., judge of the fifth judicial district of Nebraska, that a certain crime, amounting to a felony, to-wit, the murder of one Luther Mitchell, was committed on the 10th day of December, 1878, in the said so-called county of Custer, west of Sherman

county, and within the fifth judicial district of the state of Nebraska, and it appearing further that no terms of the district court have been or are now held in the said so-called county of Custer, and it further appearing that so-called Custer county is so situated geographically that under the constitution of this state that all that portion of said county of Custer lying west of Valley county is in the sixth judicial district of the state of Nebraska, and that all that portion of said Custer county lying west of Sherman county is in the fifth judicial district of the state of Nebraska, and it further appearing that no term of the district court can be called for a part of said so-called county, and that no district judge has jurisdiction over the entire county so-called aforesaid, it being in two separate and distinct judicial districts, and that said so-called Custer county, so far as holding terms of district court therein, is unorganized and not assigned to any county for judicial purposes: wherefore the county of Adams, in the fifth judicial district of the state of Nebraska, is hereby, by the judge of the said fifth judicial district, designated as the county wherein the alleged offense may be inquired into by the grand jury, and in case an indictment is found, the person or persons so indicted, tried.

In pursuance of the above act and the foregoing order, an indictment having been found by a grand jury in Adams county, plaintiffs in error were put upon their trial there, and a verdict of guilty of murder in the second degree having been returned by the jury, they were sentenced to imprisonment in the penitentiary for life. They then sued out this writ of error.

Hinman & Neville, Mason & Whedon, James Laird, and Hamer & Conner, for plaintiffs in error, contended, *inter alia*, 1. It is not within the power of the legisla-

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ture and a district judge to prevent a trial in the county where the offense is alleged to have been committed. An offense is charged to have been committed in a duly organized county, with all its county officers engaged in the discharge of their official duties. But this county is assumed to lie half in the fifth judicial district, and half in the sixth, and on this assumption it is argued that it is not *judicially* organized. There is no such thing as a "judicial organization" of a county necessary to its creation. A county is one creature of the law and a court is another, and a county may exist separately and independently of a court. The use of the word "district" in lieu of the word "circuit" may tend to produce confusion, but should not when we remember that it means the same thing—the counties where the judge may hold his courts, but not the "trial district." The "trial district" is that territory from all parts of which the jury must be selected, and under the present constitution and laws is confined to the county where the offense is committed, except the accused demands a change of venue. The act above quoted is in violation of the state constitution, and also of the constitution of the United States, because it permits the jurors, both grand and petit, to be selected in another county than Custer. Section 11 of the Nebraska bill of rights is a provision introduced from Article 6 of amendments to the United States constitution. In United States courts the jurors are selected from the whole district, and there is no law or rule by which they must be selected from any particular portion of the district, as for instance, Douglas or Lancaster county. The meaning of the word "district" in the federal constitution is well settled; it is either co-extensive with the limits of the state, or it is a subdivision of the state, similar to a county, with well defined boundaries, and having a

court compelled to select its juries from all parts of the territory in the district. It is the dominion a court—a “trial district.” If the word “district” means “trial district” in the federal constitution, should it mean something else in the state constitution? There is no adjective qualifying the word “district” in either constitution, but the intention is apparent. What is the special purpose mentioned in both these constitutions? The “right to a speedy public trial by an impartial jury.” If it were possible that the word district in the state constitution had been used to mean “judicial district” then there would be a direct conflict with the United States constitution, and in such case the provisions of the state constitution are nugatory and may be annulled and set aside. *Ex parte Garland*, 4 Wall., 358. (See argument of Reverdy Johnson.) 6 Otto, 482. 7 Otto, 518.

2. Can a judge imperil the rights of a citizen, his liberty or life, by *neglecting* to hold courts in the county in which the offense is committed, so as to enable an indictment and trial in some other county? The legislature has said so. The fact that “no terms of the district court are held” in the county, is made sufficient. There may be every facility and every reason for holding a court, yet if none has been held the judge may procure the indictment and trial elsewhere. Here, in a country where the laws are of English origin, and where the growth for centuries of the highest civilization is supposed to have culminated in the strongest safeguards to human liberty, we find one man invested with the power of dragging his fellow citizen before a foreign tribunal, from whose judgment there is no escape. This is more than regal power, it is unlimited despotism. If it be law, the right of the citizen to be secure in his person and his property, in his life and his liberty, is a dream and a myth, and the bill of

rights may be dropped from our constitutions, state and national, as a silent letter in the orthography of government.

3. If the *effect* of an act is to accomplish a result forbidden by the constitution, then the act is in violation of the constitution, and is no law. The thing accomplished thus far, is the prevention of a trial in the trial district, Custer county. Hence it follows that an unconstitutional result is brought about by unconstitutional means. Suppose that the legislature, when it re-districts the state—as it soon will—should leave some county in no district. What could then be done? No courts could be held until the county should be put in a district. It must be so in the case at bar. In dividing up the territory among the several judicial districts, suppose that it had been provided that this district, where we now are, should be bounded by certain township and range lines, and by accident, from which legislators and constitution framers are no more free than other men, this, Lancaster county, had been cut in two so that part would be in one district and part in another. It is comparatively an old county. Courts were held in it long before the adoption of the new constitution. Now, if the fact that part of a county is in one district while part of it is in another prevents the county from being judicially organized, then Lancaster county would not be judicially organized, and would be in just the same condition that Custer county is now in. But it would be none the less a county, yet no courts could be held until the county should be put into a district. Would such a mistake take away the right of trial by jury? Before the adoption of the new constitution containing the mistake every citizen of Lancaster county was entitled to trial by jury. Would the blunder remove the right or destroy it? At most, the wheels of justice would

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only be clogged until the next legislature removed the bar. If such would be the result in the case supposed, then this case must be disposed of in the same way, and a new trial should be ordered in Custer county. *State v. Denton*, 6 Coldwell (Tenn.), 589. *Osborn v. State*, 24 Ark., 629. *Ex parte Garland*, 4 Wall., 388. *Cummings v. State of Missouri*, 4 Wall., 825. *Commonwealth v. Parker*, 2 Pick., 549. *State v. Robinson*, 14 Minn., 454. *Wheeler v. State*, 24 Wis., 52. When this act was passed it found the alleged offense committed in Custer county, and no lawful act providing for a trial elsewhere. A change of the place of trial renders the act unconstitutional because the district was not "previously ascertained." Art. 6—Amendments to U. S. Const. *State of Minnesota v. Gut*, 13 Minn., 348. *Gut v. State of Minnesota*, 9 Wall., 85.

4. This act is also of the nature of an *ex post facto* law, because it renders the right of trial by jury practically worthless. Whenever the new remedy becomes worthless to either party by reason of its inefficiency, it is unconstitutional because in conflict with Sec. 12 of the Neb. Bill of Rights. *Cummings v. the State of Missouri*, 4 Wallace, 825. *Ex parte Garland*, 4 Wall., 388. 12 Wheat., 608. 8 Wheat., 1. 2 Wheat., 608. 7 Howard, 283.

5. A change of venue may be had only upon the application of the defendants. Sec. 455, Criminal Code.

C. J. Dilworth, Attorney General, and C. W. McNamar, for the State.

LAKE, J.

The first point made by counsel for the prisoners in their brief, and the first arising in the order of steps taken in the prosecution of the case is, that the affidavit

of C. W. McNamar, by virtue of which the judge of the fifth judicial district assumed jurisdiction of the alleged offense, and designated Adams county in that district as the place of trial, was insufficient for that purpose. The question thus raised was renewed by the motion to quash the indictment, and it strikes at the very foundation of the prosecution.

The supposed authority for making this affidavit, and that for the subsequent action of the judge and court based thereon, is the act of February 24th, 1879 (Session Laws 62), in the first section of which it is enacted, "That it shall be lawful for the judge of any judicial court within the state of Nebraska, when it has been made to appear to him that a crime has been committed, amounting to felony, within any unorganized county, or territory, or in any county where no terms of the district court of this state are held, attached to or in his said district for judicial or other purposes, to designate the county in his district wherein the alleged offense may be inquired into by the grand jury, and in case an indictment found, the person or persons so indicted tried." It is contended on behalf of the prisoners that this is a void act, and conferred no power whatever upon either the judge, or court, to take cognizance of the case.

That portion of the section which we have quoted—and it is all of it that need be here noticed—is but a re-enactment of a prior statute on the same subject, which, in so far as it pertains to unorganized counties in a district, was before this court in the case of *Dodge v. The People*, 4 Neb., 220, and held not to be in conflict with any provision of our former constitution. But, in view of the words, "*or in any county where no terms of the district court of this state are held,*" we were then careful, in asserting the constitutionality of the act, to go no further than was necessary in disposing

of that case. Accordingly, in the opinion of the court, by Maxwell, J., it is said that, "The act above quoted, *so far at least as it applies to unorganized counties*, is clearly within the power of the legislature." This fully met the objection in that case, and in view of the provisions of that constitution, doubtless stated the law correctly.

But, without at all questioning the soundness of that decision, it is now here contended that, by force of our present constitution, this entire statutory provision must fall. The section of the constitution for which this effect is claimed, is the eleventh of the "Bill of Rights," wherein it is declared that, "In all criminal trials the accused shall have the right to, * * * a speedy public trial, by an impartial jury of the county or district in which the offense is alleged to have been committed." This provision of the fundamental law is peculiar to the constitution of 1875, there being nothing similar to it in that of 1866, and this is the first time we have had occasion to consider it. Its language, however, is too simple, and its meaning too obvious to admit of any serious doubt as to the right thereby intended to be secured to persons charged with crime, under the laws of this state. Of the words employed, "district" is the only one as to the full purpose of which there can be, in the minds of any, even the shadow of a doubt. But this, like the word "county" in the same sentence, is used in a restrictive sense, to limit and control the exercise of both legislative and judicial power in the punishment of criminal offenders.

In its ordinary meaning the word *district* is commonly and properly used to designate any one of the various divisions or subdivisions into which the state is divided for political or other purposes, and may refer either to a congressional, judicial, senatorial, representative, school or road district, depending always upon

the connection in which it is used. In the clause quoted, very clearly it refers to neither of these, and although not synonymous with the word county, yet, by its connection with it, the intention evidently was that they should be taken in a similar sense, and as designating the precise portion of territory or division of the state over which a court, at any particular sitting, may exercise power in criminal matters. And such division, by whatsoever name it may be known in legislation, is co-extensive with, and practically limited by this constitutional provision to that from which a jury, for the particular term, may legally be drawn. And this is in entire accord with our constitutional system of district courts, by which one is designed for each organized county having criminal jurisdiction co-extensive therewith, and assisted by jurors drawn in the manner now provided by law from the whole body of the people thereof.

It is doubtless a legitimate inference from this use of the word "district," without in terms affixing to it any definite territorial limits, that the legislature may, in their discretion, by a general law create trial districts which shall include more territory than a single county. But to be effective under this provision of the constitution such law must be accompanied by one under which jurors can be called from the whole body, and not from a portion merely, of such district. In other words, the trial district and the jury district must be the same.

The grand design of this provision of the fundamental law seems to be to secure to the accused a trial by a jury from the vicinage where the crime is supposed to have been committed, so that he may have the benefit of his own good character and standing with his neighbors, if these he has preserved, and also of such knowledge as the jury may possess of the wit-

nesses who give evidence before them. Cooley's Con. Lim., 395. Presuming this view of the law to be correct, and we have no doubt that it is, how stands the case as to the question of the jurisdiction of the court ver the alleged offense? The indictment alleges the crime to have been committed "within that part of Custer county lying west of Sherman county, and within the fifth judicial district, * * * * and where no terms of the district court are held or have ever been held, and that said county of Custer has never been organized for judicial purposes and has never been assigned to any county * * * for judicial purposes." And it recites the order of the judge of the fifth judicial district, designating Adams county as the one "wherein said alleged crime * * * * should be inquired into by the grand jury, * * * and in case an indictment be found, said prisoner or prisoners so indicted be tried."

It was doubtless intended to show, by this recital, that the case was one of those contemplated by the aforesaid statute, and also the reason why the court, while sitting in Adams county, was exercising jurisdiction of a crime laid in Custer county. But even if it were conceded that this statute is in all respects a valid act, the alleged want of county organization in Custer is insufficient to bring the case within it. No such thing is contemplated by this act as a county unorganized "*for judicial purposes.*" Where a county is once organized for local government under the law providing how that may be accomplished, as Custer county confessedly was at and long before that time, and of which all courts were bound to take notice, it is organized for all the known purposes of civil administration—judicial as well as other—just as completely as is the oldest county in the state. It is clear that the act itself makes no such distinction as is here sought to

be established. It does not purport to confer jurisdiction over counties "not organized for judicial purposes," but only in "*any unorganized county.*"

There is, however, a more radical objection to be noticed. At the adoption of the constitution of 1875, the territory now known as Custer county was wholly unorganized, a portion of it being in the fifth and a portion in the sixth judicial district, as formed by that instrument. Sec. 10, Art. VI. In defining these districts, the constitution names several counties, together with "the unorganized territory lying west thereof," as the portion of the state to be embraced by each; and by the second clause of the same section, these districts were to so remain "until otherwise provided by law," that is by act of the legislature.

The boundaries of Custer county were defined by an act of the legislature, approved February 17th, 1877. In July of that year the first election of county and precinct officers was held, the county seat located, and all the machinery of a complete county organization put in motion, as the statute directs. This done, that which the legislature had set apart as Custer county, became detached from the "unorganized territory" of the constitution and united with the organized portion of the state. To it, thenceforward, the term "unorganized territory" was no longer applicable, nor could it be legally treated as such any more than could Douglas or Lancaster county.

The position taken by counsel for the state, that at the time of the alleged murder the portion of territory set apart and organized as Custer county bore, and still bears, the same relation to the fifth and sixth districts as at their creation in 1875—a part being in each—cannot be sustained. The constitution, by an arbitrary line drawn from east to west, divided the "unorganized territory"—by which is to be understood that

portion of the state remaining at any time without a county organization—between these two judicial districts. Now there is nothing in the constitution prohibiting the formation of new counties, from time to time, out of this unorganized territory, of such form and dimensions as to the legislature may seem best. But the division of a county by the line of a judicial district is expressly inhibited by the provision in the eleventh section of said article, that “Such districts shall be formed of compact territory, and *bounded by county lines*.” Therefore, upon the organization of Custer county, in 1877, its boundaries no longer embraced “unorganized territory,” but that which had become organized. It no longer existed in name merely, but was a county *de facto*, entitled to all the rights and privileges under the constitution bestowed upon these governmental divisions of the state. Its territory was no longer divided between the two judicial districts, but, by the acts of organization, was completely severed from both, and, of necessity, must so remain until the legislative duty of assigning it to one of them is performed. When organized, the county at once became a political entity, and, under the provision of the constitution just referred to, could not be parts of two judicial districts.

To show perhaps more clearly how this matter stands, suppose that in the judicial division of the state by the constitution, one of the counties—Douglas, for instance—had been overlooked, or that hereafter in a reorganization of the judicial districts by the legislature under the power given in the constitution the same thing should happen, would any one for a moment contend that by reason of such omission that county could be regarded as “unorganized territory,” or that any one of the district judges could lawfully assume jurisdiction over offenses committed therein

by removing the supposed offenders into his own district for trial by juries drawn from a county remote therefrom? If such contention could not be indulged in the supposed case of Douglas county, how can it be in the real case of Custer? As between the two, wherein lies the difference? In the case of a citizen of Custer charged with crime, is not the constitutional guaranty of a "trial by an impartial jury of the county

* * * in which the offense is alleged to have been committed," just as sacred, and equally potent, as it would be in that of a citizen of Douglas? Doubtless it is; and so long as it remains a part of the supreme law of the state there must be suitable legislative provision to enable the courts to conform their practice to it, or the conviction of criminals cannot be sustained.

Such being our views of the political *status* of Custer county, and of the rights of the accused, we have no hesitation in deciding that the district court in Adams county was without jurisdiction, and that the entire proceedings, resulting in the conviction and sentence of the prisoners, are erroneous for that reason.

Having reached this conclusion on the question of jurisdiction, it is really unnecessary to examine the numerous other questions raised on the trial and presented to us by the record; but as they are liable to be renewed in the further prosecution of the accused, we will briefly notice some of the more important of them. And the first in order is the application of the prisoners for a change of the place of trial. Under our statute on this subject, such application is addressed to the sound discretion of the trial court, and unless an abuse of such discretion be clearly shown, this court will not interfere. But here no abuse of discretion appears, and the comparative ease with which competent jurors were obtained, under the circumstances surrounding

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the case, shows the soundness of the ruling. Besides, the motion for removal was bad. In demanding that the case be sent to a county "*adjoining the county of Custer*," the prisoners sought to dictate to the court the place of trial, which of course could not be tolerated. That would have given to the accused an advantage to which they were not entitled, and of itself was good ground for denying the motion.

A large number of persons called to serve as jurors were challenged on behalf of the prisoners, on the ground of their having formed opinions as to the guilt of the accused. But we shall refer only to the cases of those to which our attention has been expressly called by counsel.

The first of these is John Forner, who, after an examination on the part of the state tending only to show him competent, was cross-examined by Mr. Laird for the prisoners, and in answer to a question as to whether he had any opinion as to their guilt, answered, "I read the newspaper accounts, and did not know anything to the contrary, and in such a case I take it for what it is worth." His estimate of what these newspaper accounts were "worth," "in such a case," is shown by a further examination:

Q. Can you now presume these men, Olive and Fisher, to be innocent?

A. Well, no, I can't. Or, yes, I think there is a possibility of their being innocent.

The juror was then challenged, when the judge made this further examination:

Q. You stated you had formed or expressed no opinion as to the guilt or innocence of the defendants here, Olive and Fisher?

A. I said so.

Q. Never read any reports of the evidence?

A. No, sir.

Q. Never conversed with any of the witnesses in the case?

A. No, sir.

Q. Ever hear any witness testify in court about the matter?

A. No, sir.

Q. Have you any bias or prejudice for or against the accused?

A. I have not.

And thereupon the challenge was overruled, to which an exception was duly taken.

In all criminal trials the presumption of law, in the absence of evidence to the contrary, is that the accused is innocent. Or, as expressed by another, "Innocence, as being the most natural and usual state, is always presumed till rebutted." 1 Phillips on Ev., 4th Am. Ed., 604, note 8. *Garrison v. The People*, 6 Neb., 285. But how can this right, mercifully vouchsafed by the law, be enjoyed, if those accused shall be required to submit their cases to the decision of jurors who are either unable or unwilling to extend it? The answer of this juror, showing as it does that his mind was so impressed by what he had read or heard that he could not presume the prisoners to be innocent, but only the "*possibility*" of their being so, is not at all modified by his further examination, which we have given. In that state of mind he could not stand indifferent between the state and the accused—an indispensable requisite to qualification when insisted upon. We are of opinion, therefore, that the challenge to this juror ought to have been allowed.

The jurors Snyder and Richardson, under the rule observed by this court in several cases brought here for review, were also disqualified. Their respective examinations elicited substantially the same state of facts as to each, and we think show very conclusively that

their minds were biased against the prisoners. To questions put to them on behalf of the state, both answered that they had opinions as to the guilt of the accused; that their opinions were formed from reading newspaper accounts of the murder; and that notwithstanding such opinions they were unbiased, and could render a fair and impartial verdict upon the evidence. But these opinions of themselves seem to have been hardly warranted in view of their further examination by counsel for the prisoners, from which we quote, first from that of Snyder.

Q. You said you had an opinion from reading the newspapers?

A. Yes, sir.

Q. Ever changed that opinion?

A. No, sir.

Q. Would it require testimony to remove it?

A. *Certainly it would.*

Q. The opinion which you now have, and which would require testimony to remove, is in regard to the guilt or innocence of the accused?

A. Yes, sir.

Q. And for the crime charged here?

A. All I know about it is what I have read.

Q. But it is in regard to the indictment for which they are on trial?

A. If they are guilty they ought to suffer the consequences.

Q. Have you an opinion as to the crime charged that would require testimony to remove?

A. I have that opinion yet.

Q. Is it in regard to the guilt or innocence of the accused?

A. Yes, sir.

Thereupon several questions were put by the court as to the basis of the juror's opinion, but bringing out nothing new, followed by this one:

Q. Can you sit on this case, notwithstanding your previous opinion, and render just as fair and impartial a verdict as though you had never heard of the case?

A. Yes, sir.

And from the examination of Richardson.

Q. You say you have an opinion?

A. Yes, sir.

Q. With respect to the guilt or innocence of the accused here, and for the crime charged?

A. I have from reports I have read or heard.

Q. Would it take evidence to remove that opinion?

A. It would.

Q. By reason of what you have heard, then, can you say whether you have any bias or prejudice against the defendants?

A. Not in the least.

Q. But you have an opinion as to their guilt or innocence which it would require evidence to remove?

A. I have.

Q. State if, in your opinion, the opinion you have formed will be liable to influence your verdict?

A. Not in the least. I have only made up my mind from reports in different journals I have read.

Q. But it would take testimony to remove it?

A. Yes, sir, it would.

Q. If there should not be enough, you would still have that opinion?

A. Yes, sir, I think I should.

Q. In your present condition of mind you want evidence?

A. Yes, sir.

By the court:

Q. Notwithstanding any opinion you have formed, can you sit on the trial of this cause as a juror, and hear the evidence, and render just as fair and impartial a verdict as though you never formed any opinion?

A. Yes, sir, I can.

Bias is that which sways the mind toward one opinion rather than another. Therefore a jury is biased when from any cause or influence he is inclined toward one party to the action rather than the other; or when, in a criminal case, he is inclined to convict rather than to acquit, or *vice versa*. And in the case of one charged with crime, if a juror's bias be so strong in favor of guilt that he cannot rid himself of it without he have evidence of innocence, his retention on the panel would certainly put the accused to a disadvantage at the outset of the trial, which in a doubtful case might be the real cause of conviction, whether justly or unjustly.

"In all criminal prosecutions" the constitution guarantees to the accused a "trial by an *impartial* jury," that is, a jury unbiased—just; a jury that will give him the benefit of all his rights, including that of the presumption of his entire innocence of crime until proven guilty. *Curry v. The State*, 4 Neb., 545. *Carroll v. The State*, 5 Id., 81. *And it is the duty of the courts to see to it that this guaranty is enforced.* We are of opinion that the challenges to these two jurors ought to have been allowed.

Several exceptions to rulings of the court on the admission of evidence are preserved, of which we will notice the more important. One of the witnesses for the prosecution, McNamar, was asked on cross-examination if he were not acting as one of the attorneys for the state, and answered that he was. This was proper, as tending to show interest on his part. He was then asked whether he were paid by the state, which, on objection on the ground of immateriality, was excluded, and we think properly. This was followed by questions as to whether he were not interested in a case against the prisoner Olive, brought by the

survivors of one of the deceased, to recover \$5,000 damages. These questions, on objection by the attorney for the state, were ruled to be "immaterial and improper cross-examination." In this we think the court erred. The evidence thus sought was material, tending as it did to show that the witness was interested in procuring a conviction, and as placing him in his real attitude toward the prisoners, before the jury, by which they could the better judge his testimony. And it was proper to bring this out on the cross-examination. Any interest which a witness may have in the result of the trial in which he is testifying, whether pecuniary or other, may be called out on his cross-examination, as affecting his credibility. Mr. Greenleaf says: "The power of cross-examination has been justly said to be one of the principal, as it certainly is one of the most efficacious, tests which the law has devised for the discovery of truth. By means of it, the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, * * * * * are all fully investigated and ascertained, and submitted to the consideration of the jury before whom he has testified, and who have thus had an opportunity of observing his demeanor and of determining the just weight and value of his testimony."

Where it is fully understood by the presiding judge that these are among the purposes of a cross-examination, he should be more inclined to enlarge than to narrow the limits to which it may be carried. Prejudicial errors in cross-examination, it will be observed, occur most frequently by restricting too much the field of inquiry.

During his examination in chief this witness also testified, that on the evening before the murder, while following the party who were taking Mitchell and

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Ketchum from Plum Creek to Custer county, three horsemen passed him, going in the same direction, and towards the place where the bodies of the murdered men were found the next morning. That he "was quite well satisfied" that the foremost horseman was the prisoner Olive, although "*it was too near dusk to define the features*" at the distance they were from him. On cross-examination he was asked how long he had known Olive, and answered "Since he has resided in Plum Creek." This was followed by two questions—"How long has he resided there?" and "Have you known him well since he lived there?"—both of which, on objection, were held to be immaterial. In this, too, the court erred. Olive certainly had the right to have the testimony of McNamar as to having seen him on the road go to the jury for no more than it was really worth, or to throw whatever discredit upon it he could by showing that his acquaintance with him was so slight, and for so short a time, that under the circumstances the pretended identification must have rested on mere suspicion only.

It is also assigned for error that, generally, throughout the trial the court refused to hear counsel in argument upon the admissibility of testimony. But we are aware of no rule making it error, *per se*, for a judge to refuse advice from counsel on a question of this sort. If he rule correctly, notwithstanding his refusal to accept the proffered information, no harm is done, and there is no error to correct.

Another and quite novel error assigned is, that the court refused to permit Mr. Laird, one of the attorneys for the prisoners, to cross-examine the witness Bion Brown, called by the prosecution, on the ground that another attorney, Mr. Hamar, had conducted the case for the defense during the direct examination. If the court so decided, it was error. The record, how-

ever, fails to show any ruling upon the question. All that it shows is this: "Pros. object to Mr. Laird cross-examining the witness, on the ground that Mr. Hamer had conducted the case for the defense during the direct examination, and referred to bar rule XIV. By Mr. Laird—I have been asked by my co-counsel to examine the witness. It would have been a pleasure to me to have done so from the first, had I been in the room when it commenced. I desire to protest on the part of the counsel for the defense against the rule in this case, and I offer to proceed with the examination of the witness in the way pointed out by law, and except to the rulings of the court." Thereupon Mr. Hamer proceeded to cross-examine the witness. What this "bar rule XIV" is we are not informed, but whatever its effect, it seems to have been construed by counsel as debarring Mr. Laird from examining the witness, and therefore no express ruling by the court upon the question was insisted upon.

A court may doubtless make reasonable rules for the regulation of the examination of witnesses, and go so far even as to require the attorney who begins either the examination-in-chief or the cross-examination to complete it. To this, however, there must necessarily be some exceptions, as where, during an examination, the attorney from any cause is disabled to proceed; in such case it may of course be concluded by another. But no rule can be upheld that arbitrarily dictates which of several attorneys in a case—there being no disagreement between them—shall examine or cross-examine a witness, or that requires the same attorney who took part in the examination-in-chief to conduct the cross-examination. A rule of this sort could serve no good purpose, and would unwarrantably interfere with the constitutional right of a party to select his own counsel to represent him in the

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several branches of the case. One attorney may be employed with special reference to the examination or cross-examination of witnesses, or of a particular witness, another to argue questions of law to the court, and still another to sum up the case to the jury, and to do this is a right which no court can rightfully deny.

On behalf of the prisoner Olive a witness was called who testified that he had the reputation of being a peaceable, law-abiding citizen. On cross-examination this witness was asked, against objection, if he had not heard of Olive having on a certain occasion drawn a revolver on some one, to which he gave an affirmative answer. On re-examination counsel for the accused proposed to show by this witness the circumstances under which, on the occasion referred to, the revolver was used. This the court would not permit, and ruled the proposed testimony from the jury.

In *Commonwealth v. O'Brien*, 119 Mass., 342, it was held to be the rule, when a person accused of a crime introduces evidence of his good reputation, that "it is not competent for the government, in reply, to put in evidence of particular facts," tending to show it to be bad. And in 1 Phillips on Evidence, 4 Am. Ed., 765, it is laid down that "evidence will not be admitted on the part of the prosecution to show the bad character of the accused person, unless he has called witnesses in support of his character; and even then the prosecution cannot examine as to particular facts, the general character of the accused not being put in issue, but coming in collaterally."

The admission of the particular fact of using a revolver, against the prisoner's objection, therefore was error; but it having been done, the error was much aggravated by refusing to permit him to show the circumstances under which he used it. And even if the prisoner had not objected to the fact thus called out

by the prosecution, he would have had the right, unquestionably, to re-examine the witness in reference thereto, and thus place the transaction in its true light before the jury. "If the counsel chooses to cross-examine the witness to facts *which are not admissible in evidence*, the other party has a right to re-examine him as to the evidence so given." 1 Greenleaf on Evidence, Sec. 468.

Although the accused has the right in all criminal cases, no matter how heinous the offense charged may be, to give evidence of his previous good character if he can, yet when it is so strongly marked by deliberation and atrocity, as in the one under consideration, if the jury are convinced that the accused participated in it, good character should be of no avail, even to mitigate the degree of criminality. Whar. Am. Crim. Law, Secs. 643, 644.

In the first instruction to the jury this language is found, and was duly excepted to by the defendants: "You," the jury, "must therefore bear in mind that it is a settled, inviolable principle that, anterior to contrary proof, the accused shall be considered as legally innocent, and that their case shall receive the same dispassionate and impartial consideration as if they were really so. Again, you must bear in mind every consideration of truth, justice, and prudence requires that if the guilt of the accused is not incontrovertibly established, however suspicious judged by you, and construed, not by arbitrary assumption alone, but by the application of the principles of experience in relation to the immutable laws of human nature and conduct."

By the first paragraph of this quotation, if we rightly understand it, the jury were in effect told that until contrary proof had been made to them the accused, though guilty of the crime charged, should be consid-

ered innocent. The language used was at least liable to leave upon the jurors' minds the impression that the judge, who had listened with them to the evidence adduced, really believed them to be guilty. If an instruction do this it is erroneous. But what was intended by the portion remaining we know not. It expresses no idea and is manifestly an unfinished sentence. Whether its effect on the jury were a proper one none can know. It is more than likely, however, that its tendency was to confuse if not to mislead them. Such being the case it was erroneous. *Mutual Hail Insurance Company v. Wilde*, 8 Neb., 427. *People v. Williams*, 17 Cal., 142.

Another instruction seriously complained of is as follows: "Every man is presumed in law to have a good character until the contrary is proved. The indictment in this case having been found and the prisoners put on trial, their characters thereby have a *stain* or *imputation* cast upon the original presumption. To remove this stain or imputation, and restore their characters to its former presumption, they have introduced witnesses to prove their good character among their neighbors and in the community in which they live, for peaceableness, quietness, and as law-abiding citizens, * * * * "

This instruction is faulty; *first*, in its statement that by the facts of indictment found and the placing of the accused on trial a *stain* or *imputation* rested on their characters; and *second*, in limiting the object of this evidence to the restoration of their characters to their former condition. Wharton says: "The general object for which such evidence is introduced is to disprove guilt." And that, even if the accused "offer no evidence of his good character, no legal inference can arise from such omission that he is guilty of the offense charged, or that his character is bad." Whar. Am. Crim.

Law, secs. 686, 687. The exception to this instruction therefore was well taken.

Another instruction complained of is one as to the effect that might be given to the testimony of an accomplice in the alleged crime. The jury were told that while it was unsafe to convict upon such testimony alone, they were at liberty to do so if, on due consideration, they deemed it sufficient. In this there was no error. "The preponderance of authority in this country is, that a jury may convict a prisoner on the testimony of an accomplice alone; though a court may, in its discretion, advise them to acquit, unless such testimony is corroborated on material points." Whar. Am. Crim. Law, sec. 783. "*The degree of credit* which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been said that they ought not to believe him unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law; it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice, without any confirmation of his statement." 1 Greenleaf on Ev., sec. 380. This instruction contained a proper caution to the jury in receiving such testimony, and we think laid the law down correctly.

Errors are also assigned to the refusal of the court to give to the jury several of the instructions tendered on behalf of the prisoners, but not having been particularly relied on in argument, we shall not take time in this opinion to refer specially to them. On looking them over, however, we find those that would have been proper related generally to matters already sufficiently charged upon, and that they might have been and probably were refused for that reason. One clear,

pointed statement of each legal proposition is sufficient. It is unnecessary to the cause of justice—nay, absolutely hurtful—to smother the jury under a load of repetitions with changed phraseology, as is sometimes done, through fear very likely of rejecting something that ought to be given them.

The only remaining point we shall notice concerns the verdict. The prisoners were found guilty as charged in the sixth count of the indictment, which charged the killing to have been done “by means to the jurors unknown.” It is contended that while there was some evidence of the deceased having been killed by shooting, hanging, or burning, there was none to justify the conclusion which the jury reached. The practice has come to be quite common in framing indictments, especially in cases where there can be a possible doubt as to the instrument or means employed to destroy life, to add a count charging it to have been done with some instrument or by some means to the jurors unknown. And in cases like the one before us, this course is not only entirely proper, but the failure to observe it would be censurable negligence in the pleader.

It not unfrequently happens in cases of homicide that the condition of the remains of the deceased is such that it is absolutely impossible to know with reasonable certainty by which of several means life was taken, while there is no doubt whatever as to who was the guilty party. In such case a count of the description of the one now under consideration enables the jury to find a verdict, when if it required them to agree upon the particular instrument or means used by the slayer, they might be unable to do so.

While in our opinion the evidence would support a finding that death was caused either by hanging or shooting, it is not so clear by which mode as to war-

rant us in saying that, in this respect, the verdict was unjustifiable.

Such being our views, it follows that the judgment of the district court must be reversed, the indictment quashed, and the prisoners handed over to the proper authorities of Custer county to be proceeded against according to law.

REVERSED.

MAXWELL, CH. J., dissenting.

To that part of the opinion of the majority of the court holding that the court below had no jurisdiction, I cannot give my assent. It may be conceded that a district for the trial of a person accused of crime cannot be formed after the commission of the alleged offense. And in my opinion that has not been done in this case. The act approved Feb. 25, 1875, provided that "it shall be lawful for the judge of any judicial district within the State of Nebraska, when it is made to appear to him that a crime has been committed, amounting to a felony, within any unorganized county or territory, or in any county where no terms of the district court are held, attached to or in his said district for judicial or other purposes, to designate a county in his district wherein the alleged offense may be inquired into by the grand jury, and in case an indictment is found, the person or persons so indicted tried," etc. Laws 1875, 81.

This act was held valid as to an offense committed in an unorganized county, in *Dodge v. The People*, 4 Neb., 220. That act was superseded by one containing the same powers, passed in 1879, after the murder with which these parties are charged was committed. Laws 1879, 62. This act, therefore, was merely a continuation of the act of 1875—that is, it was merely

continuing in force the provisions of the act of 1875, which we recently held were continued in force by the new act. *State v. McColl*, 9 Neb., 203. *In re Hall*, 10 Neb., 537. The authority of the judge in such case seems therefore to exist without serious question.

Was Custer county unorganized during the years 1878, 1879?

Section one of an act "to define the boundaries of Custer and Wheeler counties," approved Feb. 17, 1877, provides "that all that portion of the State of Nebraska commencing at the south-east corner of township 13 north, of range 17 west of the sixth principal meridian, thence north to the north-east corner of township 20 north, of range 17 west, thence west to the north-west corner of township 20 north, of range 25 west, thence south to the south-west corner of township 13 north, of range 25 west, thence east to the place of beginning, be and the same shall constitute the county of Custer." Laws 1877, 211.

This act of itself would be sufficient to form the county, were it not for the provisions of the constitution prohibiting the formation of a county in two judicial districts.

Section 10 of Art. VI of the constitution provides that "the state shall be divided into six judicial districts, in each of which shall be elected by the electors thereof, one judge, who shall be judge of the district court therein, and whose term of office shall be four years. Until otherwise provided by law said districts shall be as follows: * * * * *

Fifth District. The counties of Buffalo, Adams, Webster, Franklin, Harlan, Kearney, Phelps, Gosper, Furnas, Hitchcock, Dundy, Chase, Cheyenne, Keith, Lincoln, Dawson, Sherman, Red Willow, Frontier, and the unorganized territory west of said district. Sixth District. The counties of Cuming, Dakota, Dixon,

Cedar, Wayne, Stanton, Madison, Boone, Pierce, Knox, Antelope, Holt, Greeley, Valley, and the unorganized territory west of said district."

"Section 11. The legislature, whenever two-thirds of the members elected to each house shall concur therein, may, in or after the year one thousand eight hundred and eighty, and not oftener than once in every four years, increase the number of judges of the district courts and the judicial districts of the state. Such districts shall be formed of compact territory, and *bounded by county lines*; and such increase or any change in the boundaries of a district shall not vacate the office of any judge."

If we construe the words "until otherwise provided by law" by themselves, without reference to other portions of the instrument, the legislature would have undoubted authority to change the boundaries of a judicial district at any time. But such is not the rule of construction.

Kent says of contracts: "But if the intention be doubtful, it is to be sought after by a reference to the context, and to the nature of the contract. It must be a reasonable construction and according to the subject matter and motive. * * The whole instrument is to be viewed and compared in all its parts, so that every part may be made consistent and effectual." 2 Kent Com., 555. *The People v. Gosper*, 8 Neb., 309. And the same rule applies in construing statutes.

Kent says: "It is an established rule in the exposition of statutes that the intention of the law-giver is to be deduced from a view of the whole, and every part of the statute taken and compared together." 1 Kent's Com., 462. Section eleven therefore provides the time and mode by which the boundaries of judicial districts are to be changed, and the words "until otherwise provided by law" must be construed with reference to

this section. And this view is strengthened by an examination of Art. IV, entitled "legislative apportionment," which contains a provision that "until otherwise provided by law, senatorial and representative districts shall be formed, and senators and representatives apportioned, as follows:" etc. The above provision is substantially the same as in sec. 10, Art. VI, yet it will not be contended that the legislature can change the senatorial and representative districts at any session, as section 2, Article III, points out the time and manner of making the change, and these two sections must be construed together. It is very clear to my mind that sec. 11, Art. VI, is a limitation upon the power of the legislature, prohibiting it from changing the boundaries of judicial districts prior to the year 1880, and Custer county being composed of territory taken about equally from the fifth and sixth judicial districts, the act forming the county is a nullity, and it is still unorganized territory.

But suppose the legislature had authority to organize the county and attach it to one of the judicial districts, it has not done so. Section 11, Art. VI, provides that "such districts shall be formed of compact territory, and bounded by county lines" etc.—that is, that an entire county shall be in one judicial district. If the legislature is prohibited from placing a county in two or more judicial districts, is it not prohibited from forming one in that manner? Of this there can be no doubt. And if the action of the legislature in placing a county in two or more judicial districts would be in excess of its power, and a nullity, it is equally so if it form a new county in two or more such districts. The reason is plain. No courts could be held in such a county. The property of a citizen might be taken, his rights trampled upon, he be restrained of his liberty upon an accusation of felony, yet he could have no re-

dress. The provisions of the constitution entitling him to a "*speedy public trial*," and providing that "all courts shall be open, and every person for an injury done to him in his lands, goods, person, or reputation shall have a remedy by due course of law, and justice administered without denial or delay," cease to be safeguards for the protection of his rights, but are mere declarations without meaning or potency. But it is said the organization of the county is valid, and the provisions for courts must remain in abeyance until such time as the legislature sees fit to attach the county to a judicial district. That is, that it has in part organized the county and it will complete the organization when it sees fit, be it two or ten years. But this, in my view, cannot be done, because it defeats one of the objects for which counties are organized, viz., the administration of justice.

It is very strenuously insisted that under our present constitution, the jury must be drawn "from the county or district where the offense is alleged to have been committed." Sec. 11, Art. I, Const. The section referred to is based on the presumption that the county is settled, organized, and that courts are held therein, and when applied to the organized counties of the state is undoubtedly the law. This section is copied in substance from section six of the amendments to the constitution of the United States. But the existence of such a provision in the constitution of the United States does not prevent the United States courts from punishing crimes committed on the high seas, without the district, and perhaps thousands of miles from the place of trial. The reason is that the national authority must punish such crimes, or they could be committed with impunity. Neither may the accused select the place of trial. So a crime committed in unorganized territory in one of the judicial dis-

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tricts of this state, must be punished, if at all, by the forms of law, by permitting the judge to designate the county in which the charges may be examined and the accused tried. As that power has been properly exercised in this case, the action of the judge in that regard should be sustained.

A. J. HANSCOM, APPELLANT, V. THE CITY OF OMAHA,
APPELLEE.

Municipal Corporations: SPECIAL ASSESSMENTS: CONSTRUCTION OF SEWERS. In 1878, the mayor and council of the city of Omaha divided the city into sewer districts, numbered one and two, district one being about two and one-half miles in length, by one and three-fourths in width. They thereupon let contracts for the construction of a main sewer in the channel of a creek in said district, at a cost exceeding \$80,000, and assessed all the real estate in the district for its payment, on the ground of benefits. *Held*, that special assessments could only be levied upon property specially benefited, and only to the extent of the benefits.

APPEAL from the district court of Douglas county. Tried below before SAVAGE, J. The opinion states the case.

George E. Pritchett and *Clinton Briggs*, for appellant, cited *In the matter of Albany street*, 11 Wend., 149. *Clapp v. City of Hartford*, 35 Conn., 66. *Mayor of Baltimore v. Hughes*, 1 Gill & Johnson, 480. *Creighton v. Manson*, 27 Cal., 614. *Washington Avenue*, 69 Penn. State, 357. *The State v. Newark*, 3 Dutcher, 186. *Tide Water Co. v. Coster*, 8 C. E. Green, 519. *Sharp v. Speir*, 4 Hill, 76. *Hill v. Higdon*, 5 Ohio State, 247. *Hurford v. Omaha*, 4 Neb., 344. *State, ex rel. Abbott, v. Dodge Co.*, 8 Neb., 124.

11	37
11	81
17	335
11	37
27	440
11	37
30	353
32	470
11	37
41	365
11	37
42	123
42	189
11	37
49	892
53	168
56	523

G. W. Ambrose and John C. Cowin, for appellee, cited *Cooley on Taxation*, 110, 449. *Turner v. Althaus*, 6 Neb., 54. *People v. Brooklyn*, 4 N. Y., 419. *Shaw v. Dennis*, 5 Gilm., 405. *Philadelphia v. Field*, 58 Penn. State, 320. *Langhorne v. Robinson*, 20 Grattan, 661. *Malchus v. District of Highlands*, 4 Bush, 547. *Challiss v. Parker*, 11 Kan., 394. *Hingham Turnpike v. County of Norfolk*, 6 Allen, 353. *Baltimore v. Hughes*, 1 Gill & Johnson, 480. *St. Louis v. Oeters*, 36 Mo., 456.

MAXWELL, CH. J.

In the year 1878 the city council of Omaha divided the city into two sewer districts, by a line running from the Missouri river, west along the center of Farnham street, to the western boundary of the city, and designated that portion of the city south of said line as sewer district No. 1, and that portion north as sewer district No. 2. Sewer district No. 1, as thus formed, was about two and one-half miles in length, and about one and three-fourths miles in width. A considerable portion of the territory in the south-west portion of the district has not been laid out into blocks and lots, and is not used for city purposes. A very large part of the land in the district is high and rolling, rising to one hundred feet or more above the Missouri river. South Omaha creek rises in the south-west portion of the district, and flows north-eastwardly and empties into the Missouri river, near the foot of Jones street, and furnishing natural drainage for surface water for a considerable portion of the district. The natural drainage of the south-east portion of the district is directly into the Missouri river, and it is impossible from the intervening high ground to connect drains from that portion of the district with South Omaha creek. The natural drainage of the north-western portion of the district is directly into district No. 2. Contracts were

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let by the city authorities, and portions of two main sewers have now been constructed, one of which virtually follows the channel of South Omaha creek, and the other of a small stream that empties into said creek. No lateral sewers have yet been constructed, and the sewer, so far as the testimony discloses, is not yet used for sewerage purposes. The warrants drawn on the sewer fund exceed the sum of \$30,000, and the entire cost will greatly exceed that sum.

A special tax of three per cent was enjoined, for reasons which need not be noticed, whereupon the following ordinance was passed:

"Be it ordained by the city council of the city of Omaha:

"SECTION 1. That ordinance No. 381, entitled, 'An ordinance making a levy to pay part construction of sewers in sewer district No. one in the city of Omaha,' approved November 2, A.D. 1878, be and the same is hereby amended to read as follows:

"That a special tax of two and one-half cents on each dollar be and the same is hereby levied upon all the real estate lying and being within sewerage district No. one, in the city of Omaha, Douglas county, state of Nebraska, and according to the valuation of such real estate as fixed by the last regular assessment made prior to the date hereof, to pay for the construction of sewers constructed in said sewerage district, it being hereby adjudged and determined that all of the said (real) estate is equally benefited by said sewers, the cost of which is to be defrayed by the proceeds arising from the foregoing special tax.

"SEC. 2. That the proceeds arising from said special tax shall constitute a fund to be designated and known as the sewerage fund of sewerage district No. one, and shall be used exclusively to pay off and discharge the indebtedness arising from the construction of sewers in said sewerage district," etc.

This action was brought to enjoin the collection of this tax, upon the ground substantially that it is not authorized by law. On the trial of the case in the district court, judgment was rendered in favor of the defendant. The plaintiffs appeal to this court.

The twenty-sixth paragraph of section 15 of "An act to incorporate cities of the first class," approved March 28, 1878 (Gen. Stat., 115), gives the mayor and council of each city governed by its provisions, power "to lay off the city into suitable sewer districts for the purpose of establishing a system of sewerage and drainage; to provide such system and regulate the construction and repairs and use of sewers and drains, and of all proper house connections and branches, and provide penalties for any destruction of or injury to any sewer or part thereof."

The eleventh subdivision of section 15 (Gen. Stat. 114) gives them authority "to establish, alter, and change the channels of streams and water courses within the city, and bridge the same. *Provided*, that any such improvement costing in the aggregate a sum greater than five thousand dollars shall not be authorized until the ordinance providing therefor shall be first submitted to, and ratified by a majority of the legal voters of such city voting thereon."

Sec. 52 provides that "special taxes may be levied by the mayor and council for the purpose of constructing sewers or drains within the city. Such taxes shall be levied upon all the real estate lying and being within the sewerage district in which such sewer or drain may be situated, and according to the valuation of such real estate as fixed by the last named regular assessment made prior to such levy, and all taxes or assessments for sewerage purposes shall be collected in the same manner as other special assessments are, and shall be subject to the same penalty.

Sec. 6, Art. IX, of the constitution of 1875, provides that "the legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of property benefited. For all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

The words "by special assessment or by special taxation of the property benefited," refer to, and mean the same thing viz.: That special assessments may be made upon property to the extent of the benefits received by it. Taxation by special assessments differs from general taxation in this, that they can be imposed only to the extent of the special benefits received, while the benefits which the tax payer receives in return for general taxation are the enforcement of the laws, protection to life and property, and such other benefits as are shared by the public at large. The principle which underlies special assessments is, that the value of the property is enhanced to an amount at least equal to the assessment. This principle cannot be departed from without taking private property for public use. As was said in the case of *Tidewater Co. v. Coster*, 3 C. E. Green, 527-8, "where lands are improved by legislative action on the ground of public utility, the cost of such improvement, it has frequently been held, may, to a certain degree, be imposed on the parties who, in consequence of owning the lands in the vicinity of such improvement, receive a peculiar advantage. By the operation of such a system it is not considered that the property of the individual or any part of it is taken from him for the public use, because he is compensated in the enhanced value of such property. But

it is clear this principle is only applicable when the benefit is commensurate to the burden, when that which is received by the land owner is equal or superior in value to the sum exacted; for if the sum exacted be in excess, then to that extent, most incontestably, private property is assumed by the public. Nor, as to this excess, can it be successfully maintained that such imposition is legitimate, as an exercise of the power of taxation. Such an imposition has none of the essential characteristics of a tax. We are to bear in mind that this projected improvement is to be regarded as one in which the public has an interest. The owners of these waste lands have a special concern in such improvements so far as particular lands will be in a peculiar manner benefited. Beyond this their situation is like the rest of the community. The consideration for the excess of the cost of improvement over the enhancement of the property within the operation of the act is the public benefit. The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle that will permit the expense incurred in conferring such benefit on the public to be laid in the form of a tax on individuals."

That was a case where waste land was reclaimed, the cost being assessed in proportion to the benefits received. But the principle is applicable to the case at bar. The owner of lots has a special interest in such legitimate improvements as peculiarly affect his lots to the extent of the benefits received. But why should he be required to make public improvements beyond such benefits? As to the excess, it is not for his benefit but for that of the public, and the public should be required to bear the burden.

But it is said that the council has made a finding in the ordinance referred to, that the benefits are equal

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to the assessment. It is sufficient to say that the finding is a fraud on its face. A large part of the so-called sewer district No. one never can receive any special benefit from the construction of this sewer, and a considerable part of the remainder will not require sewerage for many years to come. The principal objects of the present sewer seem to be to furnish a permanent channel for the creek, an outlet for sewers hereafter constructed, and permanent and substantial culverts across the streets intersecting the creek. In no sense can it be called a local improvement. It is for the benefit of the entire city, and not of particular individuals. So far as appears there is not a single lot exceptionally benefited unless it be some of those in the bed of the creek. The finding therefore is incorrect, and in any event is insufficient to show special benefits.

But it is said that the mayor and council had authority to form suitable sewer districts, and that having formed the same, their judgment cannot be reviewed in this action. The answer to this objection may be found in the definition of "sewer." Webster defines a sewer to be "a drain or passage to convey water or filth under ground, a subterraneous canal, particularly in cities." A sewer district, therefore, should be composed of such territory as could be drained directly by the sewer. It would not be necessary to construct the entire sewer at one time, but in such case the cost of construction could not be levied upon property not specially benefited. The case would not differ materially from that of paving a street. If the street was not paved the entire length, the cost could not be imposed on property adjoining that part of the street not paved. Neither could the cost be imposed on property on an adjoining street, because the benefits received are those shared by the public at large.

The power to form a sewer district does not confer

authority to form a taxing district, upon which to levy taxes for the construction of sewers upon property not exceptionally benefited by their construction. Therefore when the mayor and council formed a sewerage district by arbitrary lines, and without regard to the topography or drainage of the city, and made such sewer district a taxing district upon which special assessments might be levied for the construction of sewers in any part of the district without regard to the special benefits to property, they exceeded their authority and their action therein is a nullity.

The limitations in a charter upon the power of the mayor and council to impose taxes is one for the protection of the tax payers of the municipality against the abuse of such power by their own agents. The mayor and council cannot expend to exceed \$5,000.00 without a vote of the electors, for changing or establishing the channels of streams or watercourses within the city, and bridging the same. Can they evade this beneficent provision by subdividing the city into taxing districts, and levy special assessments therein without limit or restriction? It is unnecessary to say that they possess no such power. Their authority is derived wholly from the statute, and they have no powers except such as are expressly given or are incidentally necessary to carry the same into effect, and their actions in excess of such powers are absolutely null and void.

The power of the mayor and council to levy special assessments for local improvements is limited under our present constitution to cases where the improvement confers special benefit on the property assessed, and to the extent of those benefits.

The case of *Hurford v. Omaha*, 4 Neb., 336, arose under the constitution of 1866, and has no application to the case at bar. The appellees, however, insist that

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the constitution of 1866, and not that of 1875, governs in this case because the charter was passed prior to the year last named, and not being repugnant to the provisions of the constitution of 1866 is expressly saved by the schedule, and a number of cases to which we will refer are cited, which, it is claimed, sustain that view.

In the case of *Cass v. Dillon*, 2 Ohio State, 607, the legislature of Ohio passed an act on the 24th of March, 1851, authorizing the county of Muskingum to subscribe to the capital stock of the Cincinnati, Wilmington and Zanesville Railroad Company upon condition that such subscription should be first approved by a majority of the qualified electors of the county, to be ascertained at an election held upon notice for that purpose. This vote was taken on the 14th of October of that year, and a majority voting in favor of the subscription, the county commissioners, on the 25th of the same month, subscribed, in the name of the county, \$100,000.00 to the capital stock of the company. On the 1st day of September of that year the new constitution took effect, which contained a provision that "the general assembly shall never authorize any county, town, or township by vote of its citizens or otherwise to become a stockholder in any joint stock company, corporation or association whatsoever, or to raise money for, or loan its credit to or in aid of any such company, corporation, or association." It was held by a divided court—two judges dissenting, that the above prohibition did not apply to existing laws, but merely prohibited future legislation of this character. We cannot give our assent to the law as laid down in that case. See also *Albyer v. The State*, 10 Id., 589.

In the case of *The State v. Weston*, 4 Neb., 216, it is said that the constitution is the supreme law of the state emanating directly from the body of the people.

Minneapolis Harvester Works v. Hedges.

If such is the case, if the constitution is the supreme law of the state, then whatever cannot now be authorized by the legislature cannot continue in force by virtue of legislation under our former constitution and in force at the time the present constitution took effect. Such legislation, being in conflict with the supreme law, must yield to it. And this is the rule laid down by this court. *B. & M. R. R. v. Lancaster County*, 4 Neb., 305. *State v. Lancaster Co., Id.*, 537. *Dundy v. Richardson Co.*, 8 Neb., 508. *B. & M. R. R. v. York Co.*, 7 Neb., 486. *B. & M. R. R. v. Saunders Co.*, 9 Neb., 507.

All laws in force at the time of the adoption of our present constitution in conflict with its provisions, and under which rights had not become vested, were thereby repealed so far as they were inconsistent. Sec. 52 therefore, so far as it is inconsistent with the constitution, is repealed. The judgment of the district court is reversed, and the injunction heretofore granted made perpetual.

DECREE ACCORDINGLY.

MINNEAPOLIS HARVESTER WORKS, PLAINTIFF IN ERROR,
V. IRA HEDGES, DEFENDANT IN ERROR.

1. **Practice:** APPEAL FROM JUSTICE OF THE PEACE. No appeal lies in favor of the defendant from the judgment of a justice of the peace rendered by default. But this is a provision in favor of the plaintiff which may be waived, and will be waived if he treat such appeal as valid, and without objection file the necessary pleadings on his part to make up the issues for a trial on the merits, in the appellate court. It is too late to object on the trial to the validity of the appeal.
2. ———: **EVIDENCE.** On the testimony, *held*, that the verdict and judgment were not sustained.

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40	717
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46	887
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c50	814
11	46
60	207

ERROR to the district court for Lancaster county.
Tried below before POUND, J.

D. G. Hull and R. D. Stearns, for plaintiff in error.

M. H. Sessions, for defendant in error.

MAXWELL, CH. J.

In the year 1877 the plaintiff recovered two judgments by default against the defendant, before a justice of the peace. The defendant appealed to the district court. In the district court the following stipulation was filed:

"Minneapolis Harvester Works	} In Justice's Court. Oct. 10, 1877. Stipulation.
v.	
Ira Hedges.	
Minneapolis Harvester Works	
v.	
Ira Hedges.	

"It is hereby stipulated and agreed that the above entitled suits be consolidated and entered upon appeal in district court as one case, and tried in district court in and for Lancaster county as one case." The stipulation being signed by the attorneys for the parties.

On the tenth day of December of that year, the plaintiff filed a petition in the district court upon both causes of action, and on the twenty-first of January thereafter, an answer was filed, the verification being waived by the plaintiff's attorney. The cause was tried at the March, 1879, term of the district court, and a verdict returned for the defendant, upon which judgment was rendered. The plaintiff brings the cause into this court by petition in error.

After the jury had been impaneled and sworn, but before the witnesses were sworn, the attorney for the

plaintiff objected to the jurisdiction of the court, in the following manner: "I now make objection to the jurisdiction of the court on the ground that in this cause a default was taken in the court below against the defendant, and he cannot appeal." This objection was overruled, to which the plaintiff excepted, and now assigns the same for error.

In the case of *Clendenning v. Crawford*, 7 Neb., 474, it was held that an appeal would not lie to the district court from the judgment of a justice of the peace taken by default. The party in default must move to set the default aside and have the case tried on the merits. And we adhere to that decision. But this is a mere personal privilege, and may be waived. The court has jurisdiction of the subject matter, and the parties may without objection appear and litigate the matters in controversy, and will be bound by the judgment. It is sometimes said that consent will not confer jurisdiction. This is true of the *subject matter*, but not, as a rule, as to the parties.

In the case of *Kane v. The Union Pacific Railroad*, 5 Neb., 105, the plaintiff, as treasurer of Cheyenne county, had collected illegal fees from the company, which brought an action in Douglas county to recover the same. Kane demurred to the petition upon the ground that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was overruled. Kane thereupon filed an answer alleging that the fees and penalties exacted by him were legal and authorized by law, and that the district court of Douglas county had not jurisdiction of the case. It was held that there having been an appearance and a plea to the merits, there was a waiver of all objection to the jurisdiction. *Fee v. Big Sand Iron Co.*, 13 Ohio State, 563. *Harrington v. Heath*, 15 Ohio, 483.

An appeal means the taking of a cause and its final

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determination from one court or tribunal to another. Powell on Appellate Proceedings, sec. 10. When complete, it has the effect to vacate the judgment of the court below and place the case for trial on its merits in the appellate court. If a party objects to such appeal, he must take the necessary steps to have it dismissed. He cannot be permitted to treat the appeal as valid and binding, and without objection file the necessary pleadings on his part to make up the issues in the case, and raise the objection for the first time at the trial. Such conduct is trifling with the court. *Goodrich v. Omaha*, decided at this term. The objection to the jurisdiction was therefore properly overruled.

The action was brought upon two promissory notes, each for the sum of \$45 with interest. The notes were made by Hedges in favor of J. L. Spink & Co., and assigned to the plaintiff, which claims as an innocent purchaser. The testimony shows that the firm of Spink & Company was merged in the corporation known as the "Minneapolis Harvester Works," in September, 1876, and all the members of said firm became members of the corporation, which succeeded to the business of the firm and received the notes in question. The plaintiff is not, therefore, in the attitude of a *bona fide* purchaser. The notes were given for a mowing machine, described as a "Meadow Lark Mower," which the defendant alleges in his answer "was warranted by these plaintiffs, and also by J. L. Spink & Co., to this defendant to be a good and perfect machine in every respect, and that the same would do first-class work in cutting grass of all kinds in ordinary places; that the same was constructed of the best material in every respect and particular, and that the workmanship and manufacture of the same was of the most perfect and complete kind that could be made or

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had, and that if said mower, upon trial and use, did not answer every particular in the warranty then the defendant had the right and privilege to return the same." This warranty is alleged to have been verbal, and to have been made by a sub-agent of Spink & Co., and is denied by the plaintiff, which alleges that the only warranty given was in writing and was as follows: "The said James L. Spink & Co. warrants said mower to be of good material, to be well made, and to do first-class work when properly managed. If the purchaser cannot make it perform as represented, he shall give the said James L. Spink & Co., or their agent, immediate notice thereof, who shall have the privilege of adjusting and putting said machine in order, and giving it further trial. If, upon such trial, the machine cannot be made to perform according to the above warranty, the purchaser will lay it aside, store it safely under cover, and re-deliver it, when called for, at the place where received."

The testimony shows conclusively that this was the only warranty authorized to be given, and probably the only one that was in fact given. But if we accept the defendant's theory of the warranty, still there has been an entire failure on his part to comply with its terms. The machine was purchased in June, 1875, and was retained by the defendant until the fall of 1876—until both the sickles or knives were worn nearly out. And from his own testimony and that produced by him, it appears that the machine did good work except in wire grass. His testimony upon that point is as follows:

"He (the agent) warranted the machine one year—good material, everything to be a perfect machine to cut ordinary grass.

Q. If it did not what were you to do?

A. Why, if it did not go it was to be returned. I

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told him I would not buy any machine but for cutting hay. I bought it after the season commenced for making hay. I had cut a little before. When it got to the season in August I cut half a day at a time. I cut two half days about. It may be I cut another half day, and it broke the clutch. It was along in August or September, 1875, I think. * * * * *

Q. State how it did cut grass before it finally broke?

A. When the grass was green and tender it cut very well; but when there was wire grass, it choked down. I ground it three or four times a day thinking it would cut, but it would not cut *wire* grass, etc.

Taking his own statement, the machine was warranted to cut *ordinary* grass. The complaint against the machine is that it would not cut wire grass, but there is not a particle of proof in the record to show that wire grass is ordinary grass. Taking the entire testimony, it is very clear that the defendant failed to comply with the terms of the warranty as he states it to be, and that the verdict is against the weight of evidence, and is clearly wrong. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

J. L. CASE & COMPANY, APPELLEES, v. JOHN F. SAWTELLE
AND OTHERS, APPELLANTS.

Husband and wife: CONVEYANCE TO WIFE. One S. being indebted, conveyed his real estate to H., taking his notes therefor, there being no change in the possession of the property. A few days after receiving the deed H. conveyed to the wife of S., receiving his notes and about \$100 in payment. *Held*, that H. was not a *bona fide* purchaser.

APPEAL by defendants from a decree of the district court of Clay county. Tried below before WEAVER, J.

T. M. Marquett, for appellants.

Hastings & McGintie, for appellees.

MAXWELL, CH. J.

This is an action by a creditor of J. F. Sawtelle to set aside certain conveyances of real estate made by him, upon the ground that they were made for the purpose of defrauding creditors.

The allegations of the petition are in substance, that on the 7th day of March, 1876, a judgment was recovered in the county court of Clay county by the plaintiff against the defendant, J. F. Sawtelle, for the sum of \$277.15 and costs, and attorney fees, amounting in the aggregate to the sum of \$310.73; that a transcript of said judgment was thereupon filed in the office of the clerk of the district court of said county, and on the 23rd day of March, of that year, an execution was duly issued on said judgment against the property of said Sawtelle, which, on the 4th day of April, 1876, was returned wholly unsatisfied; that the debt on which the judgment was recovered was contracted on the 28th day of October, 1874, at which time said Sawtelle was the owner of lots 451, 452, 310, 311, 312, 301, 244, 245, 246, 247, 248, 249, 250, 251, 252, 688, 65 and 66 in the town of Harvard in said county, also the south $\frac{1}{2}$ of the south-west $\frac{1}{4}$ of section 10, township 7, range 7; that after said debt was contracted, to-wit, on or about the 27th day of November, 1875, J. F. Sawtelle, and Addie A., his wife, conveyed the above described real estate to one Henry S. Hoover, who obtained the same without consideration, and for the purpose of hindering and

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delaying creditors of said Sawtelle; that on the 15th day of December, 1875, Hoover and wife conveyed said real estate to Addie A. Sawtelle without consideration, and with the intent to hinder and delay creditors of J. F. Sawtelle; that both of the last mentioned deeds were filed for record on the 15th of December, 1875.

The prayer of the petition is to have said conveyance set aside and have the real estate in question subjected to the payment of the judgment.

The defendants in their answer deny that the deed to Hoover was made for the purpose of hindering or delaying creditors, but allege that the same was made in good faith and for a good and sufficient consideration.

The reply is a general denial. A decree was rendered in the court below in favor of the plaintiffs, from which the defendants appeal to this court.

There is but one question presented by the record, viz.: Was Hoover a *bona fide* purchaser of the real estate in question? If so, if he was a purchaser in good faith, subsequent fraudulent acts would not vitiate the purchase, although they might be considered as evidence for the purpose of showing want of good faith in making the purchase. The question of good faith must be determined from the circumstances attending the transaction. Without recapitulating the testimony in the case, it is sufficient to say that it is proved very clearly that Hoover was not a *bona fide* purchaser. He paid nothing for the property. It is true that he gave his notes payable to Sawtelle for the amount said to have been agreed upon, but a few days afterwards these notes were surrendered to him upon his executing a deed for the property in question to Addie A. Sawtelle. He was also allowed about \$100 in trade. There was no change in the possession of

the property, although there seems to have been a number of buildings, including a hotel, on the lots in controversy.

The whole transaction has the appearance of a scheme to transfer the title of the property from Sawtelle to his wife, and prevent its application to the payment of his debts. As the debt was contracted before the transfer of the property, it is liable for its payment. The judgment of the district court must therefore be affirmed. We desire to call attention to the costs in the case in the district court, taxed at \$188.29. But six witnesses were examined, and the amount of costs seems exorbitant, but as the items are not before us we must presume that they were properly taxed.

JUDGMENT AFFIRMED.

FERDINAND WESTHEIMER AND OTHERS, PLAINTIFFS IN
ERROR, v. D. A. PHILLIPS AND OTHERS, DEFENDANTS
IN ERROR.

Mortgage Foreclosure: DEFENSE. Defendant D. A. P. was indebted to plaintiffs on notes and book account in the sum of \$589.25, most of which was past due, and which he was unable to pay. The agent of the plaintiffs agreed that plaintiffs would lend defendant \$250. Defendant executed and delivered to plaintiffs his four notes, amounting in the aggregate to \$789.25, and, with his wife, the other defendant, executed and delivered to plaintiffs a mortgage to secure said notes, and "if the money was not sent the notes and mortgage were to be returned." Plaintiffs refused to advance the \$250 promised by their agent, whereupon defendant demanded the return of the notes and mortgage, which was not done. Afterwards defendant received the old notes from the plaintiffs, made two considerable payments on one of the new notes, and demanded that the \$250 contained in the said new notes over and above what he owed plaintiffs be divided into four equal parts, and one part thereof

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credited on each of the new notes, which was done. On suit to foreclose the mortgage, *held*, that by accepting the return and delivery to him of the old notes, making two considerable payments on the new notes, and procuring the credit of the \$250 on them, the defendant waived his right to the return of the said notes and mortgage, and that the same remain in force.

ERROR to the district court of Fillmore county. It was an action for the foreclosure of a mortgage given as security for the payment of certain notes, tried before WEAVER, J., who rendered a judgment upon the notes in favor of plaintiffs for the sum of \$563.31 and costs, but refused to "enforce said mortgage, it being against equity and conscience." Plaintiffs thereupon brought the cause here by petition in error.

James Laird and B. F. Smith, for plaintiffs in error.

Brown & Marshall and Will R. Gaylord, for defendants in error.

COBB, J.

The court below found the following facts :

I. That at the time the notes and mortgage in question were executed, the defendant, D. A. Phillips, was indebted by notes and account to the plaintiffs, Westheimer Brothers, in the sum of \$539.25.

II. That the notes and mortgage were executed for \$250.00 more than was due from D. A. Phillips to plaintiff.

III. That plaintiffs agreed with the defendant, D. A. Phillips, at the time the mortgage and notes were executed, that in consideration of defendants securing the indebtedness already existing and the further sum of \$250.00, that the plaintiffs would loan to defendant, D. A. Phillips, the sum of \$250.00.

IV. That defendant, D. A. Phillips, made the mortgage in question with the express understanding

aforesaid, with the agent of the plaintiffs, that he, Phillips, was to receive a loan of \$250.00, and that the promise of the \$250.00 was the sole moving cause and consideration for the making of the mortgage.

V. That plaintiffs never furnished the \$250.00 to defendant, D. A. Phillips, though urgently requested to do so.

VI. That plaintiffs refused to ratify the contract made between their agent and D. A. Phillips.

VII. That plaintiffs endorsed \$250.00 on said notes, said endorsement bearing even date with the making of said notes. And that said endorsements were made to cover the amount said plaintiffs were to furnish.

VIII. That defendant, D. A. Phillips, paid plaintiffs on his indebtedness \$55 on the 12th of December, 1876, which, with the knowledge and without the objection of said D. A. Phillips, was endorsed on one of the notes sued on.

IX. That D. A. Phillips, on the 1st day of March, 1877, sent plaintiffs \$85.00, with orders to endorse the same on one of the notes sued herein, and that said amount was endorsed as requested.

X. That there is due plaintiffs at this date, on said notes, \$563.31, and that, as a matter of law, plaintiffs are entitled to judgment for that amount.

XI. That it was the express agreement and understanding between the agent of the plaintiffs and the defendant, D. A. Phillips, at the time the mortgage herein was executed, that the said mortgage should not be enforced except upon the payment by plaintiffs to defendant, D. A. Phillips, of the sum of \$250.00, and said amount has never been paid.

The point on which I think this case turns is that considered by the district court in the eleventh finding. But two witnesses testified as to the facts and circumstances under which the notes and mortgage, upon

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which the suit was brought, were made and delivered—Jacob Westheimer, agent of the plaintiffs, and the defendant, D. A. Phillips, himself.

The testimony of Mr. Phillips on that point is as follows :

Q. State what was said the night before ?

A. He (Jacob Westheimer) came into the store and asked how I was getting along. I don't know what the reply was to the question exactly.

Q. Give the substance if you can ?

A. I told him business was dull. I think he called me down at the soda fountain and told me he had a proposition to make me. Something to help me out. After I went into the office he stated his proposition.

Q. What was it ?

A. His proposition was to extend my time on what book account and notes were due, or all I owed them, and that he would extend the time and loan me two or three hundred dollars. Give all the time I asked for on the old account and loan me some money, as one of the Westheimer Brothers had died and left a large estate, and the house just as soon I would have the money at a reasonable interest as any one else, and this proposition would help me out.

Q. On what terms would he do that ?

A. On the terms that I would secure him.

Q. For what ?

A. For the account due for the old indebtedness of two or three hundred dollars.

Q. Did you settle then the amount he was to advance ? State what further was said.

A. I told him I would consider the matter and let him know in the morning.

Q. What was done in the morning ? Did he come to the store that day, and what did he say ?

A. He came to the store and I told him I would

accept the proposition, and then we had the papers made out, the mortgage drawn, and the notes drawn. We figured the amount, and the notes and mortgage were drawn in the morning.

Q. Was there anything further about these notes and mortgage before they were executed, between you and Mr. Westheimer, as to any conditions on which you executed them? Why the notes were sent up to the house? (Objected to by plaintiffs as incompetent, and calling for a conclusion. Overruled and objection noted.)

A. The notes were to be sent into the house and the mortgage sent to Geneva for record, and on receipt he was to send me \$250.00. That was the amount agreed on.

Q. What did you do with the notes and mortgage?

A. Gave them to Mr. Westheimer.

* * * * *

Q. Go on and tell what was to be done; was there anything said in case they did not send the money? (Objected to by plaintiffs as incompetent. Overruled and exception noted.)

A. The proposition was that the money was to be sent. If the money was not sent, the notes and mortgage were to be returned.

* * * * *

Q. Was the money sent?

A. No, sir.

The testimony of Jacob Westheimer directly upon the point under consideration was as follows:

Q. Mr. Westheimer, what was said about the extension of time you speak of, and what was said between you parties there?

A. What time do you refer to?

Q. The time of the making and delivering of the notes and mortgage, the 14th of March?

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A. I came along in the usual course of business and asked that money be paid.

Q. What did Mr. Phillips say?

A. He could not pay me.

Q. Give us an account of the transaction.

A. Mr. Phillips expressed his inability to pay me, and as I stated before, he wanted time, and one of us, I don't know which one, broached the subject of giving security.

Q. What I desire to get at is just this, I want to know what the condition was of \$250.00 over value, that the notes call for?

Objected to by def'ts counsel. Objection overruled and exception noted.

A. The \$250.00 as Mr. Phillips represented to me, and as I believe I satisfied myself from the records, was requisite to clear the property of any incumbrance then existing, and I wanted to get the first mortgage. There should be no preceding lien on the property. I don't remember anything further about it.

Q. State what you said to him about furnishing the money.

A. I told him that the firms were administrators of the estate of a brother of theirs, and might have money in that, and might advance him to that amount.

Q. State what was said or agreed about the delivery of this mortgage and these notes?

Objected to by def'ts.

Q. State what was said and done in that connection?

A. The notes and mortgage were executed and the notes were delivered to me and I kept possession of them. The mortgage I think was handed to me, and I think I handed it back to Mr. Phillips. My recollection is, that we came down together and filed it for record. There was no talk between us that in a cer-

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tain event the mortgage should be null and void. Either Mr. Phillips or myself gave orders to the recorder of deeds to forward it to my house; I don't know who gave the instructions.

Q. That was to forward it to the plaintiff's?

A. My house, Westheimer Brothers, St. Jo.

Q. What did Phillips say when he delivered that mortgage to you, if anything?

A. I don't remember of anything particularly, that I can recollect that he told me now. Nor do I know that Mr Phillips himself handed me the mortgage.

Q. Mr. Westheimer, tell the court where it was he delivered this mortgage to you, if he did deliver it?

Objected to. Objection overruled and exception noted.

A. He delivered the notes and I think the mortgage to me, at the time they were executed at Mr. Gaylord's office.

Q. Did he deliver them both together?

A. I think he did.

Q. What did he say right there at that time?

A. I cannot recollect anything he said in particular.

Q. Was you present to the best of your recollection when the mortgage was delivered down here to the clerk?

A. I think I was.

Q. Did you hear what was said?

A. I believe I did.

Q. What did he say at the time he delivered that to the clerk?

A. As I stated before I am not positive he handed the mortgage to the clerk, whether Phillips or myself handed it. I do not remember of anything said further than that the mortgage should be recorded and forwarded to Westheimer Brothers, St. Joe, Mo.

* * *

Q. What was to be done with the mortgage and notes in case you did not get the \$250.00?

Objected to, overruled, exception noted.

A. There was nothing said in the event the \$250 was not forthcoming, that the mortgage should be null and void, and I don't remember what words passed as to how the amount which was to be sent if not forthcoming, how it should be credited, I don't remember.

I have thus quoted at tedious length all of the testimony on that point, for the purpose of showing that so far as there is any difference between a condition precedent and a condition subsequent the eleventh finding of fact is unsupported by evidence.

The finding is that the plaintiffs received the mortgage with the condition that the same should not be enforced "except upon the payment by the plaintiffs to the defendant D. A. Phillips of the sum of \$250," while the only evidence which tends to sustain such finding is that of Mr. Phillips himself in the following language: "The proposition was that the money was to be sent. If the money was not sent the notes and mortgage were to be returned."

I think that there is a clear distinction between the two propositions, and that under the testimony the plaintiffs by virtue of the mortgage became vested of security for their debt, but at the same time they became legally bound to pay the defendant Phillips \$250, or relinquish and return the said security. It was the right of said defendant to stand upon and enforce this obligation on the part of the plaintiffs. Had he done so it might have become the somewhat difficult duty of the courts to decide as to what measure of relief was available to him. But he did not elect to avail himself of this right.

In examining this question it will be well to bear in mind that proposition which has been so often adher-

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ed to by this court, that "a mortgage security is a mere incident to the debt." The last clause of the 4th finding, which is in the following words, "and that the promise of the \$250 was the sole moving cause and consideration for the making of the mortgage," is not only unsupported by the evidence in the case but is inconsistent with the third finding. The obtaining of the \$250 may have been the "moving cause" which induced the said defendant to give the mortgage, but it was not "the sole consideration." According to his own testimony he was indebted to the plaintiffs in a large sum of money, nearly all of which was past due and which he was unable to pay. By giving the mortgage he got an extension of time on said indebtedness which the law makes a good consideration for a contract.

From the findings of fact, as well as from the evidence, it appears that Phillips owed the plaintiffs \$539.25; their agent agreed to lend them \$250, making \$789.25. For this amount the said defendant, on the fourteenth of March, 1876, executed his three notes for \$200 each, payable respectively in six, nine, and twelve months from said date, and one note for \$189.25, due in fifteen months from date, and secured them by the mortgage in controversy. On the twenty-third of the same month, the plaintiffs wrote to Phillips refusing to loan him the \$250. On the next day, March 24th, Phillips answered said letter of the plaintiffs, complaining of their treatment, urging them to comply with the agreement of their agent and send him the \$250, and—I quote from the letter, "if you cannot do as I expected, you will please return the notes I gave him and the mortgage, for I will be compelled to raise money by that means, and if I give security I would not like to give it for more than I owe my creditors." On the twenty-eighth, the plaintiffs answered

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the above letter, again declining to send him the \$250, explaining why they could not, and urging him to pay a part of his indebtedness to them. I quote from their letter: "We request you again to send us, if possible, some money, for we really need it very much. As for having more notes than you owe us, please borrow no trouble on that account, and be assured we do not want any more than is due us. If you could send us, say \$200, now, and secure us otherwise for the balance, even on a reasonably long time, we would willingly relinquish all other claims against you."

The next communication between the parties was a letter from the defendant, D. A. Phillips, to the plaintiffs, dated Fairmont, Aug. 12, 1876, of which the following is a copy:

"*Westheimer Bros., St. Joe, Mo.:*

"Dear Sirs—Will you please send notes and mortgages held by yourself against me to Eller & Co., at this place, for their inspection, or to W. R. Gaylord, Not. Pub., here, or to any person you may pick to suit yourselves. It will greatly oblige me. Please see that I have my proper credit of \$250, or \$62.50 on each note. You may send by registered letter. The object of the party who wishes to see them is to see if the proper credit is or is not on them. The county records show all, and they are not satisfied with my receipt from your agent.

Truly yours,

"D. A. PHILLIPS."

The next and only other letter between the parties, as shown by the record, was also written by the defendant, D. A. Phillips, to the plaintiffs, and which I also copy:

"FAIRMONT, NEB., March 1, 1877.

"*Westheimer Bros., St. Joe, Mo.:*

"Dear Sirs—Please find enclosed draft in your favor

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for eighty-five dollars. Please credit on the note you hold against me for this amount, and oblige.

"Truly yours,

"D. A. PHILLIPS."

It satisfactorily appears from the evidence that previous to the date of the above letter, the two original notes which the plaintiffs held of the defendant Phillips had been given up to him, so that the notes secured by the mortgage in controversy were the only notes of Phillips which the plaintiffs then held.

It also appears, as well from the evidence as from the eighth finding of fact by the district court, that on the twelfth day of December, 1876, the defendant Phillips had paid to the plaintiffs' agent the sum of fifty-five dollars on one of the notes secured by the said mortgage.

I conclude, therefore, that although the plaintiffs had retained the new notes and mortgage contrary to the agreement between their agent and the defendant, D. A. Phillips, yet that said defendant finally acquiesced in such retention, and by accepting the said original notes from the plaintiffs, making two payments on the new notes, and demanding that the \$250—which the said notes contained, above what he actually owed the plaintiffs, being the amount which their agent promised but which they refused to advance to him—be divided into four equal parts, and one part thereof endorsed on each of the said four notes, he waived his right to insist upon the return of the said notes and mortgage, or either of them.

No case is cited by counsel, nor am I able to find one in which a debt, being admitted or proved a security therefor, has been adjudged void, in an action between the parties giving and receiving such security. Nearly all of the cases cited are controversies between mortgagees and other creditors of the mortgagor, and

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the question has been whether the delivery of the note and mortgage was absolute or in escrow. And it is not too much to say that in none of them, where the delivery has been held to be in escrow, are the facts such as to bring them within the principles of the case at bar. I am therefore of the opinion that the decree of the district court be reversed and the cause remanded to the district court, with directions to enter a decree of foreclosure in accordance with this opinion.

REVERSED AND REMANDED.

ROBERT KITTLE AND OTHERS, PLAINTIFFS, V. JOHN E. SHERVIN, TREASURER OF DODGE COUNTY, DEFENDANT.

11	65
35	123
35	123
11	65
41	305
11	65
61	151

1. **Taxes: SALE OF REAL ESTATE.** Since the taking effect of the act of 1877 [Laws, p. 43], a county treasurer has authority to sell real estate without first exhausting the personal property of the tax payer.
2. ———: ———: **PRIVATE SALE.** Under the revenue law in force December, 1877, where real estate had been advertised, and not sold for want of bidders, the county treasurer could sell the same at private sale, and was not required to give notice of or invite competition at such private sale.
3. ———: **CERTIFICATE OF SALE.** Section 54, General Statutes, 917, being repealed by Laws 1877, page 48, and not being in force at the time of the tax sale for the year 1876, the county treasurer, in selling real estate for delinquent taxes, could, by virtue of the law of 1871 [General Statutes, 517], make a separate sale of real estate for delinquent city taxes of cities of the second class, issue a separate certificate therefor, and be entitled to receive the same fee as upon sales for delinquent state and county taxes.
4. ———: **INTEREST ON DELINQUENT TAXES: CONSTITUTIONAL LAW.** Provisions of law allowing the holders of certificates of tax sale forty per cent per annum upon the redemption of lands from such sale, are not in violation of section 15, Article III of the constitution, which provides that "the legislature shall not

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pass local or special laws * * regulating the interest on money."

5. ———: BOARD OF EQUALIZATION. One who does not appear before the board of equalization cannot afterwards by original action defeat the levy of taxes, and a sale of his property thereunder on the ground that a large amount of other property escaped taxation by an under assessment, thereby increasing the rate on his property.
6. ———: CITY TAXES. A city council sitting as a board of equalization have no authority to raise the assessed value of all the property of said city by raising the aggregate value of each assessment a certain per cent.
7. ———: ———. A tax levied upon all real estate of a city and not upon personal property, for the purpose of making local improvements, is unconstitutional and void.

ORIGINAL application for an injunction to restrain defendant from issuing a tax deed upon certain property owned by plaintiffs, in pursuance of a sale for taxes thereon, plaintiffs contending that the same were void.

R. Kittle, for plaintiffs.

Marlow & Munger, for defendant.

COBB, J.

In considering the several points arising in this case, I will endeavor to follow the order as I find them in the agreed state of facts submitted by the plaintiffs and defendant, omitting, however, No. 1, as that does not present a controverted point.

2. That plaintiffs had, on the first of January, 1876, and up to the present time, owned and occupied the premises the taxation of which constitutes the subject matter of this suit, and have owned and kept thereon publicly "sufficient personal property to more than three times in value of the said taxes of any one year thereon accruing," etc.

The point is here presented that the said county treasurer could not lawfully sell the real estate of the plaintiffs for delinquent taxes as long as they had and possessed personal chattels on the said land sufficient to pay the said taxes.

The law as contained in the General Statutes, secs. 49 and 50, 916, made it the duty of the county treasurer to proceed, as soon after the first day of May of each year as practicable, to collect all delinquent taxes by the seizure and sale of the personal property of the delinquent tax payers, if any such personal property could be found, and such provision was made to apply "as well to the taxes assessed on real estate and remaining unpaid as to delinquent taxes assessed on personal property." And while said sections remained in force, this court has repeatedly held that a sale by the county treasurer of lands for delinquent taxes assessed thereon, without first making an effort to find personal property out of which to make the taxes, where such delinquent tax payer was the owner of sufficient personal property in the county out of which such taxes could be made, was void. But sections 49 and 50 were repealed by the act of February 15, 1877 [Laws, p. 43], which took effect June 1, 1877, four months before the sale complained of, so that the authority and certainly the reason of the Nebraska cases fail to sustain the position of the plaintiffs on this point.

8. After setting out the several funds into which both the county and city taxes were distributed as assessed upon the said block for the year 1876, the stipulation proceeds to the fourth point, as follows:

"4th. That on the fifth day of December, 1877, the said taxes so levied and assessed remained unpaid

* * * The said real estate having been by said treasurer previously advertised for sale for both

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the taxes levied by said county commissioners and by said city council, and not sold for want of bidders, said county treasurer did, on said fifth day of December, 1877, sell said real estate to J. T. Smith at private sale and without notice to these plaintiffs or opportunity for competition in bidding, except by advertising to sell on a previous and other day than said fifth day of December, as before stated, for said tax of 1876, to-wit: \$63.70, together with the additional sum of \$4.55, as interest on the same, and the sum of twenty cents costs of advertising for sale. Total \$68.45." "And the said treasurer charged the said J. T. Smith, as fees for making said sale, \$3.40, the five per cent provided by statute in case of actual sales, and the sum of fifty cents for a sale certificate." "And afterwards and on the same day said county treasurer again sold said premises to said J. T. Smith for said city taxes, to wit: \$25.85 together with the additional sum of \$1.85, as interest on the same, and twenty cents costs of advertising for sale. Total \$27.90." "And said treasurer charged said J. T. Smith, as fees for making said sale, \$1.39, the five per cent fee provided by statute in case of actual sales, and the sum of fifty cents for a sale certificate, making \$102.16 paid to said treasurer by said J. T. Smith, for which said treasurer, the defendant, claims payment from plaintiffs, together with forty per cent interest thereon from the said fifth day of December, 1877, or in case of failure or refusal of plaintiff to pay said sum and said interest thereon, then in such case defendant, said treasurer, threatens to deed said premises to pay said sum and interest."

The points sought to be established by this clause of the stipulation are, 1st, that the said sale is void for the want of notice and an opportunity for competition at the said sale. The statute in force at the time providing for the sale of lands for delinquent taxes required

the county treasurer to give notice of the sale by publication thereof once a week for three consecutive weeks, commencing the first week in August preceding the sale, in a newspaper of his county, if there be one, and if there be no paper published in his county, shall give notice by a written or printed notice posted on the door of the court house * * * and the same statute also provides that, "after the tax sales shall have closed, and after the treasurer has made his return thereof to the county clerk * * * if any real estate remain unsold for the want of bidders therefor, the county treasurer is authorized to sell the same at private sale, at his office, to any person who will pay the amount of taxes, penalty and costs thereof for the same" etc., *Gen. Stat.*, 917, 921.

The advertising and offering of such lands at public sale is a condition precedent to their sale at private sale. But it is expressly stated in the said stipulation that the said real estate had been previously advertised for sale for the said taxes, and not sold for the want of bidders. The very terms "private sale" exclude all idea of publication of notice therefor, and competition in bidding thereat. And 2d, that the said J. T. Smith, the purchaser of said lands, was charged by the said county treasurer for two certificates of sale instead of one.

Section 54 of the revenue law, as found on page 917 of the General Statutes, provided that "whenever in the collection of any district, town, city, or local tax, which may have been levied according to law, the collector is not able to make the tax by distress and sale of personal property, and real estate is to be sold for the same, it shall be the duty of the collector of the tax to send such delinquent list to the county treasurer on or before the 15th day of July of each year, and the county treasurer shall receive the delinquent list, and

advertise the same at the same time he advertises the sale of real estate for delinquent taxes as hereinafter provided, by adding the amount of such delinquent district, town, city, or local tax to the amount of the delinquent state, county and other taxes, and shall sell such lands for the purpose of paying all such delinquent taxes as hereinafter directed, and shall credit the proper district, town, city, or locality for the amount of taxes so collected," etc. But sec. 54 was repealed by the act of February 19, 1877—see pages 44-48, laws of 1877—and was not in force at the time of any of the proceedings complained of. Under its provisions it seems quite clear that but one certificate should have been issued and charged for by the county treasurer; but said section being repealed, the county treasurer was, for his authority to sell said property, for delinquent city taxes at all, relegated to section 2 of the act entitled "An act to provide the manner of collecting city taxes in cities of the second class, and to define the duty of certain city officers," approved June 6th, 1871, and to be found on page 157 of the General Statutes. Under the provisions of the latter section there can be no doubt of the power of the county treasurer to make a separate sale of property for delinquent city taxes, and to make a separate certificate of such sale, and I think that it necessarily follows that he would be entitled to charge and receive the same fee therefor, as upon sales for delinquent county taxes. But suppose I am wrong in this conclusion. It is neither claimed or admitted in the said stipulation that the said treasurer sold the said real estate for said delinquent taxes including the said certificate fee of fifty cents. But the complaint on this point is that the said county treasurer charged and received from the said J. T. Smith the said sum for the said certificate.

The fourth and fifth paragraphs of the stipulation

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relate to the payment, by the said J. T. Smith, of the delinquent taxes on the said real estate for the years 1877 and 1878, upon which no point seems to be made. Paragraphs 6 and 7, which will be considered together, are as follows:

"6. That said plaintiffs being unable to pay said taxes before the fifth day of September, 1879, for causes beyond their control, did on that day offer to pay to said treasurer the said sum of \$102.16, with interest thereon from the fifth day of December, 1877, at the rate of 12 per cent per annum, on condition that the said sale of said block 2 be cancelled and declared by said treasurer void, and the taxes on said premises for the year 1876 to be receipted paid by plaintiffs, and so marked on the tax book of that year, which offer was then and there rejected by said treasurer," etc.

"7. That said treasurer then and there demanded the said sum of \$102.16, and the said several sums which appear as aforesaid to have been paid by the said J. T. Smith, together with 40 per cent per annum interest thereon from said dates of payment, as the only condition on which said treasurer would allow said plaintiffs to redeem said premises from the said sale, and the return of said certificates and the cancellation thereof."

Upon these clauses of the stipulation the plaintiff would seem to seek to raise the point that the said J. T. Smith, having bought in the said real estate for the delinquent taxes of 1876, and the same remaining unredeemed, and becoming again delinquent for the taxes of 1877 and 1878 respectively, and the taxes thereon for said last two years being paid by the said J. T. Smith, under the provisions of section 61 of the revenue act (Gen. Stat. 921), that the owners of the said real estate could redeem the same from the said

sale without paying the said subsequent taxes. But if such was their intention, they have not followed it up in their brief, and I can scarcely see how they could successfully, under the provisions either of sec. 64 of the old revenue law (Gen. Stat., 922), or sec. 119 of the act of 1879, Laws of 1879, 324.

But the principal question sought to be presented in these paragraphs is that of interest. Plaintiffs claim that the provision of the old revenue law, allowing the holders of certificates 40 per cent, and of the new allowing them 20 per cent interest upon the redemption of the lands, are repugnant to the provisions of the 16th clause of section 15 of article III of the constitution.

The words "the interest on money" as used in the article referred to, are equivalent to the words "interest for the loan or forbearance of money," and refer exclusively to the question of lawful interest between borrower and lender, debtor and creditor, as distinguished from usury. The exacting of interest from a delinquent tax payer is not the enforcement of a right based upon contract, but is the exercise of a branch of governmental sovereignty similar to that of eminent domain. The constitution contains several sections limiting the taxing power and defining the right of redemption from tax sales, all of which are plain and direct, and when it is borne in mind that neither our former constitution (or, as I believe, that of any one of our sister states) had placed any limitation upon the legislative discretion as to the rate of interest on tax sales, it is unfair to suppose that, had the framers of the instrument under consideration sought to ingraft upon it so radical a principle as that contended for, that they would have used a form and language of such doubtful construction, and more especially is this the case when it is also remembered that it is an universal canon of construction that acts of limitation,

however sweeping their terms, are never held to include the state, unless it be specially named. The imposition of a high rate of interest on tax sales has for its primary object, the prompt payment of the revenues of the government, and for this purpose it is sought to operate on the tax payer and induce him to pay his taxes and thus avoid the payment of heavy interest; failing in this, to offer to other parties a field for the investment of money at a higher rate of interest than that paid by borrowers, so that in no event shall the state and its municipal agencies be deprived of the revenues necessary for their support. But if every owner of property, instead of paying the taxes thereon, can make himself the debtor of the state therefor, and let it run for an indefinite length of time at the same rate of interest, or even less than that at which money can be borrowed on the best of security, it needs but little experience in the business of life to see that the prompt payment of taxes could not be relied upon.

So that, as I cannot conceive that it was the intention of the framers of the constitution to withhold from the legislature the power to provide for the support of the state government, I cannot believe that they employed the language relied upon for the purpose of restricting the rate of interest on tax certificates to twelve per cent or to seven per cent as would be the logical result of the position urged by the plaintiffs.

"8. That the tax lists furnished to the tax payers of said city and precinct by the assessors for said several years 1876, 1877, and 1878, to make return of their property thereon, were so arranged and worded that said tax payers were led to believe and did believe that it was their lawful right to return their moneys and credits less their liabilities, and to return the capital employed in business as the amount of their personal

property so employed less their liabilities, instead of the actual personal property owned by and employed in their possession on the first day of March in said years. And said tax payers so made the return of their said property, and it was so assessed by said several assessors, and so valued less said liabilities, and taxed less the same for said several years, and not taxed as real property was taxed, without deduction for said liabilities of the owners thereof. And by reason of such exemption of personal property plaintiffs' taxation was 15 per cent greater on his said real estate."

Undoubtedly we have thus presented in the stipulation a great evil which exists in all parts of the state, and by means of which many traders and other owners of personal property in a great measure escape taxation to the extent of greatly injuring the owners of real estate by the unjust increase of their taxes. But unfortunately neither the allegations of the plaintiffs' petition nor the facts as agreed upon in and by the stipulation, are such as to entitle the plaintiffs to relief in this respect.

Sections 5 and 6 of the revenue law then in force, Gen. Stat., 898, provided for the furnishing by the county commissioners of each county, on or before the first Monday of February of each year, to the precinct assessor suitable notices and blank forms for the assessment, and such instructions as may be needful to secure full and uniform assessments and returns.

The latter section also provides what the said lists to be filled out by each property owner shall contain, etc.

All of this is matter of public law, of which all persons of sound mind and who have arrived at years of discretion are charged with knowledge. And even were we informed by the pleadings or stipulation, which we are not, in what respects the lists furnished

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to the tax payers of Fremont city and precinct failed to come up to the requirements of law, I cannot conceive how they could have been "so arranged and worded" as to lead the tax payer to construe the law as stated. But the probability is that any misunderstanding that may have existed on the part of the property owners was a wilful one on their part.

If such an assessment as that described in the petition and stipulation was made, then it was the privilege, if not the duty, of the plaintiffs and all persons similarly situated to appear before the board of equalization and have the same rectified. Section 27 of the revenue law then in force, Gen. Stat., 907, gave the board of equalization ample power, and made it their duty, upon complaint being made to it, to remedy all errors in the assessments. See *S. C. & P. R. R. v. Washington Co.*, 3 Neb., 40. The time of the annual meeting of said board was fixed by law, at which time it was their duty to decide all questions concerning the assessments, without adjournment, and their decisions were endowed with the quality of judicial decisions, reviewable only on error in the higher courts. Now the question is presented whether a tax payer can ignore the existence of such tribunal created for his protection, and, after the lapse of many years, for the first time bring his case to this court and claim that an act of an assessor, clearly remediable before such board but never presented, had rendered nugatory the scheme of taxation of an entire county. And this not only for one year but for three years in succession. It seems to me that the mere statement of this proposition is sufficient to demonstrate that such claim cannot be allowed.

The plaintiffs rely upon the case of *Weeks v. The Supervisors of Milwaukee Co. et al.*, 10 Wis., 240. As I understand that case, the distinction there made, as well as in the other Wisconsin cases touching upon

this question, is that where taxable property in a city is knowingly and with a design to benefit the city by increasing its population and business exempted from taxation by the common council or other legislative authority of the city, the taxes levied on other property of the city being thereby necessarily increased, are illegal and uncollectible—otherwise when property is left off of the assessment roll by mere non-action or as the result of ignorance or stupidity.

No. 10 of the agreed state of facts is devoted to the taxes levied under the authority of Dodge county upon the taxable property of Fremont precinct, for the purpose of paying interest on bonds issued for erecting a bridge across the Platte river. Upon referring to the clause of the petition upon this branch of the case, we find it to be in the following language:

“10. That the said taxes levied for said Fremont precinct bridge bonds were levied, collected, and threatened to be collected in violation of law and the right of said plaintiffs, and that said taxes were levied to pay for said bridge which was built on land not owned by private parties and not on any public road or highway, but as a toll bridge, and said precinct never contracted for nor had any right, title, or interest in said bridge nor become liable therefor.”

It will be readily seen that the above allegations present no issue or question for the adjudication of this court. They are mostly in the form of recitals and present conclusions rather than facts.

It seems from the agreed state of facts that the entire proceeds of said bonds, amounting with the interest to one hundred and fifty thousand dollars, has, through mismanagement or ill fortune, or a combination of the two, been lost to the people of Fremont precinct. This is a serious loss to that people. Any defense which the law would permit them to make to

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this indebtedness ought and doubtlessly would meet with the sympathy of the court, but I fail to find such defense in the facts set forth in the said petition.

There is one other point made by the plaintiffs against the said county tax. The facts upon which it is based are stated in the stipulation as No. 14, and are too lengthy to be inserted here. But they amount to this: That the First National Bank of Fremont, situated in said county, for the years in question was assessed and valued for taxation at only \$50,000, when its average resources during said years were \$248,884. We have already reached the conclusion, while considering this subject under another head, that the mere under assessment of one piece or species of property, while such under assessment will necessarily increase the rate of taxation on all other taxable property in the district from what it would have been had such under valuation not been made, yet that the board of equalization is the tribunal to remedy such wrong, and even if denied there, it cannot have the effect to render the whole scheme of taxation void. But there was no law, either constitutional or statutory, rendering the *resources* of national banks taxable, and the slightest examination of the subject will show that such law would be open to graver objections than any of the numerous ones which the plaintiffs have urged against the law as it now stands. Among the items going to make up these resources, I take from the copy of the report of said bank, which plaintiffs have attached to their petition as an exhibit, the following: "Current expenses and taxes paid \$3,166.25." When taxes themselves become a subject of taxation we may expect to see opposition to their payment indeed. Upon an examination of the report it will readily be seen, what most people know without examination of all banks in this country, that its resources consist chiefly of de-

posits—money due to depositors; which we are bound to presume has been given in to the assessors by, and taxed to them.

The law providing for the taxation of the stockholders upon their shares of stock in such institutions is to be found on pages 97–8 of the laws of 1875, and for aught that appears in the petition or stipulation of facts in this case has been complied with by the authorities of Dodge county. But even if it has not, I know of neither principle nor authority making that a legal excuse to the plaintiffs for failing to pay the taxes on their property.

“9. That the said Fremont city council, sitting as a board of equalization for each of the said several years 1876, 1877, and 1878 did, without any notice to the taxpayers or to the plaintiffs, raise the aggregate assessed value of each and every assessment in said city 10 per cent above the assessed value as made by the several assessors for said years. And said city so raised said valuation for the purpose of taxing the property in said city 10 per cent more than could have been levied as assessed. And said valuation of said plaintiff's premises and of all property in the said city was 10 per cent higher in its assessed value than the same was for county and state purposes assessed.”

The city council, sitting as a board of equalization, had no power to raise the assessed value of all the property assessed in the said city. Such raising of the valuation is not equalizing in any sense. Counsel for defendant suggest that such action on the part of the city council is within the principle announced by this court in the case of *Dundy v. Richardson County*, 8 Neb., 508. In that case the county commissioners, sitting as a board of equalization, raised the assessed value of all the farm or acre lands of Falls city precinct 22 per cent. This was done presumably for the purpose of equaliz-

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ing the assessment of such property with that of similar property in the other precincts of the county. And this the court held they could do upon certain conditions. But this would by no means apply to the action of the city council. They had nothing to do with the assessments in the precincts or other cities of the county. The only values that were before them were those of the property of the several persons and corporations of their own city; and their only duty was to equalize the assessments as between these so that the burden of taxation might rest equally upon the tax payers of the city in proportion to the true value of their several taxable possessions.

The general law governing cities of the class to which Fremont belongs limits their power of levying taxes to 5 mills on the dollar in any one year for general revenue purposes and to an equal amount for general improvement purposes [Gen. Stat., 142.], and it appears from the agreed state of facts that the action of the said city council was for the purpose of avoiding the effect of the said limitation. As well might this court be called upon to sanction an open violation of law, as a covert one, particularly when the intent to violate it by indirect means stands admitted in the record.

But while the additional value of ten per cent placed upon said property by the city council cannot be sustained as a basis of taxation, yet the said action of the council does not vitiate the assessment as made by the assessors.

The stipulation or agreed state of facts contains the following as the 11th and 12th clauses: "That the said taxes so levied by the said city of Fremont, which was upon the real estate and not upon personal property in said city for streets and sidewalks, was so levied according to the said valuation upon all the real estate with-

in the limits of said city, and not any part of said levy was upon the personal property in said city, nor were said taxes for said purposes specially assessed against the property particularly benefited by improvements made thereby, but for the purpose of improving the streets and crosswalks of the said city generally whenever and wherever deemed necessary.

12. That the said taxes levied by the said city of Fremont listed and charged against plaintiff's said premises as "Sixth Street fund" were so levied by said valuation upon all the real estate in the city of Fremont, and no part thereof on the personal property within said city, and said taxes were levied for the sole purpose of widening said Sixth Street. * * *

13. That the said city widened Main street from First to Sixth street for the length of five blocks only at a heavy expense * * * to pay which there was by said city council levied a tax upon all the real estate in the city in proportion to said valuation thereof, and no part of said taxes was levied upon the personal property in said city for said purpose. * * *

We have here presented the question whether the provisions of the second subdivision of sec. 31, Chap. 9, of the General Statutes are repugnant to those of sec. 6 of article 9 of the constitution of 1875.

In an important case lately argued in this court involving a construction of the section above referred to, the court was undivided in the opinion that the provisions of said section applied to previous legislation, and that under them the corporate authorities of cities, towns, or villages could be vested with power to levy and collect but two kinds of taxes. 1st. By special assessments or by special taxation (two ways of expressing the same thing) of property benefited. This only for purposes of local improvements. 2d. For all other corporate purposes to assess and collect taxes; but such

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taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. *Hanscom v. City of Omaha, ante page 37.*

Applying this view to the case at bar there is no difficulty in coming to the conclusion that the taxes embraced under the foregoing heads are illegal and void.

From these views I conclude that all the taxes levied by the authority of the city of Fremont upon the real estate of said city alone, and not upon personal property, and which taxes were levied upon all the real estate of said city and not confined to the property benefited by the local improvement for which the same were levied, as well as the one-eleventh part of all other taxes assessed by the authority of said city—being the taxes assessed upon the increased valuation of said property caused by the act of the council of said city in adding ten per cent to the assessed value thereof, as returned by the assessor, and which taxes went to make up the amount for which the property of the plaintiffs described in their petition was sold, as well as all of such taxes which entered into and constituted a part of the subsequent taxes paid by such purchaser upon the said real estate, should be deducted from the apparent amount of the lien of the said purchaser upon said real estate for and on account of such sale, purchase, and payments.

But J. T. Smith, the purchaser of said real estate for the said taxes, not being before the court nor a party to these proceedings, this court cannot pass upon his rights nor grant the relief to which from the above view the plaintiffs seem to be entitled.

The necessary parties not being before the court to enable the court to render an effective decree or judgment the cause is dismissed at the cost of the plaintiffs.

JUDGMENT ACCORDINGLY.

AUGUST J. FALSKEN, APPELLANT, v. JOHN F. HARKENDORF AND OTHERS, APPELLEES.

1. **Trust Estate in Land.** Where it is sought through the establishment of a trust by parol evidence to defeat the title of one holding the fee of real estate, under a deed absolute, the essential facts relied on must be clearly proved or the attempt will fail.
2. ———. Evidence in support of alleged trust examined, and held to be inadequate.

APPEAL from the district court of Richardson county. Tried below before WEAVER, J. Beyond the facts stated in the opinion it may be added that the defendant Harkendorf was the executor of John G. Falsken, and the other defendants are devisees under his will bequeathing the land in controversy.

Schoenheit & Thomas, for appellant.

Clarence Gillespie, for appellee.

LAKE, J.

The right of the plaintiff to the relief sought rests upon an alleged express trust. He states in his petition that his wife Bertha shortly before her death in 1875, being desirous of conveying the land in controversy back to him, from whom she had received it, "was informed and believed that she could not do so directly, or in any other manner than by conveying to some third person as trustee, and having such third person convey to her husband. Thereupon for the purpose of so conveying the said premises to plaintiff, and for no other purpose, on the first day of May, 1875, the said Bertha made a deed of conveyance of the said

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premises to the said John G. Falsken, who had consented to act as such trustee. The said John G. Falsken paid no consideration for the said deed, and the same was so made to him, at his suggestion, solely for the purpose of having him convey said premises to the plaintiff herein. The said deed was filed for record in the office of the recorder of said county of Richardson on the 1st day of May, 1875, and was recorded in Book 20, page 537. At the time of making said deed, the said John G. Falsken took upon himself said trust, and promised and agreed to and with the said Bertha, and plaintiff herein, that he would execute the same, and would convey the said premises to the plaintiff whenever called upon to do so."

It is further alleged, and of this there is no dispute, that John G. Falsken held the title so received until his death, which occurred in September, 1877, a period of over two years; and that he left a will, bequeathing this, with other property, to his four grandchildren, two of whom are sons of the plaintiff. However, for the purpose, evidently, of avoiding the moral effect of this seemingly fair disposition of his property by the granddaughter, and his treating it as if it were in truth, what it appeared to be, his own, the plaintiff alleges that when he "made said will he did not intend to include therein the land aforesaid, nor to devise the same."

On an examination of the evidence we find nothing whatever, aside from the deed itself, to indicate the purpose of the grantor, Bertha, in making it. And the deed being absolute, the only inference to be drawn from her making it is, that she intended merely to invest John G. Falsken with the fee, and to his own use. As to the allegation that she was advised to convey "*to some third person as trustee,*" in order to place the title in her husband, there is not a particle of evidence.

Indeed there is none to the effect that she was advised, or consulted anyone, on that subject.

Concerning the execution of the deed but very little is disclosed. As to who drafted it, nothing. The witness Marvin swears that he, as justice of the peace, took the acknowledgment, but saw no consideration pass between the parties. Nothing was said on that occasion, which he understood, as to the object for which the deed was made. There was, therefore, so far as we are advised, no trust declared, or even contemplated by the grantor at the time of the conveyance. And the same is true of the grantee. As before shown it is averred in the petition that the deed was "*made to him at his suggestion*" solely for the purpose of having him convey to the plaintiff. But there is not a syllable of evidence to warrant this assumption. This, as well as the allegation of the grantor having been advised that it was necessary to convey the title "to some third person as trustee," as a means of finally placing it in her husband, is a very important fact in the case as made by the petition, and, if true, ought by all means to have been proved.

There is, however, some testimony, but not at all satisfactory, tending to show that John G. Falsken took the conveyance for the purpose alleged, and also that he paid no consideration therefor. This testimony consists of declarations said to have been made by him in the presence of the witnesses Uhl, and Charles Falsken and his wife, subsequently to the time he received the deed. Uhl testified that he overheard "a conversation between John G. Falsken and August Falsken, the plaintiff, in reference to what he *supposed* to be this very property in controversy." This was in 1877, and, according to Uhl, "August merely said, 'Father has got my property in his name,' or words to that effect; it was in German; and the old gentleman said,

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‘Yes, the property is in my name, and I will make a deed now;’ but August said, ‘No, it is late; we have got to go home.’”

Charles Falsken testified that his father said “he got the deed from plaintiff just for a trust; that he would sign it back to him at any time he would call on him; that he did not call it his own. Then he said he had not paid anything for it.”

Q. Did you have more than one conversation about it with him?

A. Yes, he spoke about it several times.

Q. Did you talk with him shortly before his death, or any time?

A. He mentioned it that August didn’t call on him to sign it back to him; he was ready any time.

Q. What did he mean by signing it back to him?

A. The property.

Q. Making a deed to him?

A. Yes, sir.

On this subject, Minnie, the wife of the last named witness, testified as follows:

Q. What did he (John G. Falsken) say?

A. He said he hadn’t bought the land, but they wrote it over to him; he had it in his own name.

Q. Did he say what he was going to do with the property?

A. He said he was going to give it back to August Falsken any time he wanted.

Q. Did he say anything in regard to paying for the land?

A. He said he did not pay anything for it.

And on cross-examination she testified that this talk took place in May or June, 1875.

All of this, besides being, what hearsay declarations of one deceased are always considered, very weak testimony, has opposed to it the fact, pretty clearly estab-

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lished, that at the time of this transaction the plaintiff was owing his father an amount about equal to the value of the property so conveyed, which was discharged of record on the very day the deed was made. Also, that John G. Falsken held the title for more than two years, and in the meantime treated the land as his own, even to the extent, as before stated, of making it the subject of a solemn bequest to his grandchildren, which we cannot bring ourselves to believe he would have done had he been under an obligation to convey it to his son. The averment in the petition, to the effect that this property was put into the will by mistake, and thus unintentionally made the subject of bequest, has no foundation in fact, there being no evidence to support it. Where it is sought through the establishment of a trust, by parol evidence, to defeat the title of one holding the fee of real estate under a deed absolute, the essential facts relied on must be proved with great clearness and certainty, or the attempt will fail. "Loose and equivocal facts ought not to control the evidence of deeds." 1 Perry on Trusts, sec. 137.

After a careful consideration of the evidence, not only are we unable to say that the court below incorrectly estimated its value, but, on the contrary, we believe that in holding it to be insufficient to establish the alleged trust, the only conclusion that could safely be drawn was reached.

In the very dim light shed upon the transactions of the parties respecting this property, prudence seems to dictate that rather than disturb this absolute title, we should guard it as left by the holder at the time of his decease. Holding these views, the judgment must be affirmed.

JUDGMENT AFFIRMED.

JOHN P. BECKER, PLAINTIFF IN ERROR, V. THE WESTERN
UNION TELEGRAPH COMPANY, DEFENDANT IN ERROR.

1. **Telegraph Company: ERRORS IN TRANSMITTING MESSAGE: LIABILITY FOR.** A telegraph company has a right to make reasonable rules and regulations relative to sending dispatches, and thereby limit its liability for errors not occasioned by gross negligence or wilful misconduct. A condition that the company will not be responsible for the correct transmission of messages beyond the amount received therefor, unless repeated, at an additional expense, is a reasonable regulation, and if brought home to the sender of a message, or made the subject of special contract, will be enforced as to all errors not caused by gross negligence or wilful misconduct.
2. ———: ———: ———: When a message is sent subject to such a regulation, the mere fact that there was an error in the message as delivered is not of itself, and without further proof of carelessness, sufficient to authorize the plaintiff to recover anything beyond the amount paid for sending it, and interest thereon.

ERROR to the district court of Douglas county. It was an action for damages, arising out of the alleged negligence of the defendant in transmitting and delivering to the plaintiff a telegraphic dispatch in terms different from those in the message left for transmission. On Nov. 28, 1873, the plaintiff telegraphed from Columbus, Nebraska, to W. R. Preston & Co., commission merchants, in New York city, to know what they could sell 20,000 bushels of wheat for, to be delivered in December, to which W. R. Preston & Co. replied in the following terms: "Think we can sell twenty thousand at one fifty—December. Shall we? Answer quick. W. R. Preston & Co." Instead of this dispatch being delivered to the plaintiff, one was delivered to him in the following terms: "Think we can sell twenty thousand at one *sixty*—December. Shall we? Answer quick. W. R. Preston & Co."

11	87
32	736

11	87
56	417
56	418
56	419

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Thereupon, and on the same day, the plaintiff instructed Preston & Co. to sell the 20,000 bushels, and to apply five cars, then in transit, on the sale. On the next day, Nov. 29, plaintiff received from Preston & Co. a dispatch informing him that they had sold 20,000 bushels at one dollar fifty, to be delivered in December. This resulted in a telegraphic correspondence, from which the mistake which had occurred in the first dispatch became developed, but not until after the contract had been made by Preston & Co. for the sale of the wheat at \$1.50. The wheat was all delivered by plaintiff as contracted for by Preston & Co., and this suit was brought to recover damages sustained by the plaintiff, by reason of the false information conveyed in the first dispatch delivered to plaintiff, purporting to have come from W. R. Preston & Co. Upon a trial before SAVAGE, J., and a jury, verdict was rendered in favor of plaintiff for \$6.50 (amount paid for dispatch and interest) and costs, and from judgment thereon plaintiff came here upon a petition in error.

George W. Doane, for plaintiff in error, cited *Tyler v. Telegraph Co.*, 60 Ill., 421. *Rittenhouse v. The Independent Line of Telegraph*, 44 N. Y., 263. *Leonard v. N. Y., Albany & Buffalo Electric Co.*, 41 N. Y., 544. *De Rutte v. N. Y., Albany & Buffalo Electric Co.*, 30 How. Pr. Rep., 403. *Western U. Tel. Co. v. Carew*, 15 Mich., 255. *Shearman & Redf. on Neg.*, sec. 559.

James M. Woolworth, for defendant in error.

LAKE, J.

The alleged errors to be considered pertain to the instructions to the jury. The charge was full, covering every point arising in the case necessary for the jury to be informed upon, and was evidently prepared

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with care. We shall notice only those portions of it which counsel has specially pointed out as being objectionable.

It is said by counsel in his brief that "the most serious error committed" is in those portions of the charge wherein "reference was made to the right of the defendant to adopt rules and regulations whereby to restrict its liability in this class of cases, and the effect of the adoption of such rules and regulations." The ground taken on this point, being that there was nothing in the pleadings by which these rules and regulations were made at all material. In all this we think counsel labors under a mistake. Evidently the rules and regulations referred to by the judge were those copied into the answer as being on the message blanks, and forming the basis of the alleged contract between the Telegraph Company and Preston & Co. the senders of the message. The most important of these rules, in fact the only one of them necessary to be here considered, is that which provided that the company should "not be liable for mistakes * * * of any *unrepeated* message beyond the amount received for sending the same." The jury were told that this was not an unreasonable regulation on the part of the company, and "if brought to the knowledge of persons dealing with them, and assented to by such persons," would be binding upon them. The effect of such regulation was given in these words, which we accept as a fair statement of the law: "If, therefore, you find from the evidence that, at the time this telegram was sent, the rules and regulations which have been offered in evidence were in force along the defendant's line, and such regulations were brought to the knowledge of the senders of the message, or the plaintiff, and assented to by them, and the message in question was not directed to be repeated, and that the defendant

used suitable instruments and machinery, and employed skillful operators, who, in the transmission of the message, used ordinary care, and were not guilty of actual negligence in the premises, then the plaintiff cannot recover anything beyond the price of the message and interest thereon." This, we are of opinion, stated the law correctly, and was necessary to a fair comprehension of the pleadings and evidence by the jury. The fact that the judge referred to these printed conditions upon which alone messages would be sent as "rules and regulations" instead of "agreement" or "contract" is of no importance. We suppose that they were essentially rules and regulations until accepted by delivering the message for transmission subject to them, when they at once became a binding contract between the company and the senders. *Wolf v. Western Union Telegraph Company*, 1 Am. Repts., 387.

The plaintiffs' counsel tendered several instructions embodying the views for which he now contends on this question. They are substantially that a telegraph company cannot, by a rule or regulation like the one just referred to, limit liability for errors committed in the transmission of messages. That such a rule is unreasonable and contrary to public policy. Further, "that the defendant, in order to exonerate itself from responsibility for the mistake, should have shown how it occurred, and in the absence of such proof the jury will be justified in presuming a want of ordinary care on the part of the defendant." These, with other propositions of similar import founded thereon, which in the absence of all restrictions would have been suitable, were rejected by the court, and as we think, properly. The law, as it is finally settled by the better authorities, is otherwise.

In *Redpath v. Western Union Telegraph Company*, 112 Mass., 71, it was laid down that the sender of an un-

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repeated message written upon a blank of the company having a printed heading which specified that the company should not be liable for mistakes in the transmission of an unrepeatd message beyond the amount received for sending it, could not recover more unless the mistakes were caused by gross negligence or fraud. 17 Am. Repts., 69. And in *Breese v. United States Telegraph Company*, 48 N. Y., 132, it was ruled that conditions in telegraphic messages as to repeating are reasonable, "and where a person writes a dispatch and signs his name upon a blank containing a printed condition that the company will not be responsible for the correct transmission of the message unless it is repeated at an additional expense, he cannot recover for an error in transmission, the condition as to repeating not being complied with, and there being no allegation of gross negligence or wilful misconduct on the part of the company." This case is reported in 8 Am. Repts., 526. In the opinion of Earl, C., this language is used: "But, while they" (telegraph companies) "are bound to transmit all messages delivered to them, they have the right to make reasonable rules and regulations for the conduct of their business. They can thus limit their liability for mistakes not occasioned by gross negligence or wilful misconduct, and this they can do by notice brought home to the sender of the message, or by special contract entered into with him." And in the same case Lott, C. C., in speaking of conditions limiting the company's liability printed upon message blanks, said: "The conditions are reasonable, and not against public policy. On the contrary, they subserve to carry out the objects for which telegraphic associations are created, and especially to secure the receipt of a message in the words in which it is written and delivered for transmission. A party using such a blank, and writing his dispatch thereon, assents to the

terms and conditions on which it is sent. If he omits to read or to become informed of them it is his own fault. A contract voluntarily signed and executed by a party in the absence of misrepresentation or fraud, with full opportunity of information as to its contents, cannot be avoided on the ground of his negligence or omission to read it, or to avail himself of such information." See also on this point *The Western Union Telegraph Co. v. Carew*, 15 Mich., 525; and of similar import is *Grinnell v. Western Union Telegraph Company*, 113 Mass., 299—18 Am. Repts., 485—where Gray, C. J., says: "According to the weight of authority a regulation that the liability of the company for any mistake or delay in the transmission or delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated for any cause except wilful misconduct, or gross negligence on the part of the company."

The reasonableness of the rule thus recognized by the courts must be seen and acknowledged by all who give heed to the fact sworn to on the trial by several expert witnesses, and denied by none, that the only known means of reaching absolute accuracy in the transmission of messages by telegraph is by repeating them, that is returning them to the office from which they were sent, for comparison with the original.

Many additional authorities on this point might be cited, but these will suffice, representing, as they do, the current of decision. In the case before us there is no pretence either of gross negligence or wilful mis-

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conduct on the part of the company, so that the instructions complained of are not only amply supported by adjudged cases, but were suited to the facts upon which the jury were to pass. Besides, the evidence of the existence of rules and regulations limiting the company's liability, known and accepted by the plaintiff, was clear and convincing, notwithstanding his assertion that he had never read the headings to the message blanks. It is a noticeable fact, however, that the plaintiff in his testimony does not deny that he well understood that such rules and regulations existed, and the importance of having his messages repeated to insure accuracy in their transmission. He admitted on his cross-examination that for several years he had received and sent hundreds of dispatches, sometimes several in a single day, writing them, as occasion required, on the company's blanks, or on ordinary blank paper, so that if he did not know of these rules it was because of his own gross carelessness. From what we have said it follows that the instructions requested by the plaintiff, as to the degree of care the company was bound to exercise in the transmission of the message in question, were properly refused, as by these "the highest degree of care and diligence" on the part of the company would have been requisite to avoid liability to the full extent of the damages caused by the alleged error, notwithstanding the aforesaid limitation. So, too, of other instructions tendered and refused, to the effect that the defendant, in order to escape such liability *in any degree* for the erroneous transmission of the message, notwithstanding said rules and regulations, was bound to show just how the error was brought about, and that it was through no fault on its part.

As we have already seen, where such rules and regulations are in force, and the message is sent with reference to them, the company cannot be made liable

beyond the amount received for sending the message, and interest, except for injuries caused by gross negligence or wilful misconduct on the part of its agents. And so the jury were told, as shown by the instruction above quoted and others of like import.

The eighth paragraph of the instructions is pointed out by counsel as specially objectionable, and was in these words: "If there were such rules and regulations, so assented to, the mere fact that there was an error in the message as delivered would not of itself, without further proof of carelessness, be sufficient to authorize the plaintiff to recover anything beyond the price of the message and interest thereon." There is no error in this instruction, which is fully supported by the authorities already cited. The jury did return a verdict in favor of the plaintiff for the sum paid by him for sending the message, which was all he was entitled to, gross negligence or wilful misconduct being neither charged nor proved, and he being clearly subject to the rule or regulation by which the company restricted its liability to that amount.

As before stated, the charge in this case was evidently prepared with care, and after a full examination of all the authorities cited we are satisfied that it states the law of the case correctly, in every particular, and therefore the judgment must be affirmed.

JUDGMENT AFFIRMED.

Dow v. Updike.

SIMON S. DOW, PLAINTIFF IN ERROR, V. UPDIKE BROTHERS, DEFENDANTS IN ERROR.

Promissory Notes: ATTORNEY'S FEE. A stipulation in a promissory note to pay a reasonable attorney's fee for instituting and prosecuting a suit on the note, in addition to legal interest, is unauthorized by law and void.

ERROR to the district court of Adams county. Tried below before GASLIN, J.

A. T. Ash, for plaintiff in error. No brief on file.

Batty & Ragan, for defendants in error, cited *Wiley v. Starbuck*, 44 Ind., 298. *Billingsley v. Dean*, 11 Ind., 381. *Sperry v. Horr*, 32 Iowa, 184.

MAXWELL, CH. J.

The plaintiff brought an action in the district court of Adams county upon a promissory note, of which the following is a copy:

"\$250.00. HASTINGS, NEB., July 20th, 1879.

"One hundred days after date, for value received, I promise to pay to the order of Updike Brothers two hundred dollars, together with interest thereon at the rate of ten per cent per annum from date till paid, and if I fail to pay this note or any part thereof when due, I promise to pay the holder thereof, in addition to the above named amount mentioned in this note, and at its maturity, a reasonable attorney's fee for instituting and prosecuting to judgment a suit on this note.

"SIMON S. Dow."

The second count of the petition sets forth the contract to pay attorney's fees, and alleges that the sum of \$25 is a reasonable fee. To this count a demurrer

11	95
11	309
16	308
17	494
18	598
23	709
11	95
31	409
11	95
35	510
11	95
30	767
11	95
42	155
11	95
57	203

Dow v. Updike.

was interposed, which was overruled and judgment rendered for the face of the note and interest, and \$25 attorney's fee. The defendant brings the cause into this court by petition in error.

Sec. 5 of the act to amend chapter 34, General Statutes, entitled "Interest," approved Feb. 27, A.D. 1879, provides that "if a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved the contract shall not therefore be void; but if in any action on such contract proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid." Laws 1879, 113.

In the year 1878 "An act to provide for the allowance and recovery of attorney's fees in certain actions," was passed by the legislature. This act provided "that in all actions brought for the foreclosure of a mortgage, or upon a written instrument for the payment of money only, there shall be allowed by (to) the plaintiff upon a recovery of judgment by him a sum to be fixed by the court in addition to the judgment, not exceeding ten per cent of the recovery, as an attorney's fee, in all cases wherein the mortgage or other written instrument upon which the action is brought shall, in express terms, provide for the allowance of an attorney's fee." Gen. Stat., 98. This act was repealed in 1879, the law taking effect June 1, of that year. Laws 1879, 78. The defendant in error insists that the repeal of the act did not take away or impair the right to recover attorney's fees.

In the case of the *State of Ohio v. Taylor et al.*, 10 Ohio, 378, one Taylor borrowed \$25,000, for which he executed a bond in proper form, secured by mortgage,

but containing no agreement to pay attorney's fees. At the same time he executed a warrant of attorney on the same paper, to confess judgment for the amount, with seven per cent per annum, and five per cent thereon in addition for attorney's fees in case of suit being brought. A decree having been taken by default, the court of common pleas refused to include the attorney's fees in the decree. On appeal to the supreme court, the court say: "It must be admitted, if this agreement can be enforced, the statutes of Ohio regulating the rate of interest, whether upon loans by the fund commissioners or in other cases, are at once virtually repealed. * * Seven per cent is the maximum of *interest* the commissioners are authorized to contract for or receive for the forbearance of their loans. They are prohibited from receiving more in fact in express terms, that is *as interest*. It is said, however, that the five per centum in this case is, by the agreement of the parties, to be added to the seven per cent, not as interest, but as *costs*, agreed upon as such for collection by the parties. Now it seems to us to be of little consequence in this case what this five per cent may be called, but the inquiry is, what is the thing itself? However it may be disguised, it is very clear to us it is a mere shift or device by which twelve per cent is retained as interest upon this loan, and in this view of the case cannot be enforced. * * *

At common law no costs were allowed. If a plaintiff failed in his action he was amerced for his false clamor, but costs were not adjudged against him. In Ohio no costs are given to a successful party, unless authorized by statute, with but one or two exceptions, and the statute defines the items and imposes severe penalties upon the ministers of the law for taking other or higher costs or fees than are expressly provided for." The judgment of the common pleas was affirmed. To the

same effect see also *Bank of Wooster v. Stevens et al.*, 1 Ohio State, 233.

The above decisions are as applicable in this state as Ohio. Costs are not allowed in this state unless authorized by statute, and the law imposes penalties for the taxation of illegal costs or for contracting to receive a greater rate of interest than the maximum allowed by law.

In the case of *Toole v. Stephens*, 4 Leigh, 581, certain parties were indebted to a bank which recovered judgment against them. The debtors thereupon applied to the bank for indulgence, and an extension of the time of payment was agreed upon by the debtors giving real estate security for the debt, and in addition to pay the costs of suit and the commission of the attorney of the bank for securing the debt. It was held that the commissions to the attorney were usurious. The reason is, the law fixes a limitation to the amount to be paid for the use of money. If the borrower may be compelled to pay ten per cent collection fees in addition to lawful interest, in case suit is brought, could not a contract to pay ten, twenty, or a greater per cent, as liquidated damages, in case of failure to pay promptly at the day the debt became due, be enforced? And thus the law regulating the rate of interest be virtually repealed. Such agreements, including those for attorney's fees in actions on contracts, will not be enforced by the courts. See also *Bullock v. Taylor*, 39 Mich., 137. *Myer v. Hart*, 40 Id., 517. *Witherspoon v. Musselman*, 14 Bush, 214. In this state attorney fees were not allowed prior to the passage of the act of 1873, and the legislature by repealing that act evidently intended to withdraw from the plaintiff the right to recover the same. The judgment of the district court is reversed, and the demurrer to the second count of the petition sustained.

REVERSED AND REMANDED.

IN THE MATTER OF THE APPLICATION OF HENRY A.
CARLETON FOR A WRIT OF HABEAS CORPUS.

11	99
62	497a

Bastardy: EVIDENCE. In a prosecution for bastardy by a woman claiming to be unmarried by reason of her husband having a wife living at the time of her marriage to him, *held*, that hearsay evidence as to such prior marriage of her husband having been admitted without objection, tended to prove that she was unmarried and would be sufficient when the offense charged was clearly proved, to prevent the court from discharging the accused on a writ of *habeas corpus*.

ORIGINAL application for a writ of *habeas corpus*.

Bush & Richards, for petitioner.

MAXWELL, CH. J.

The petitioner being accused by one Elenora Seilling of the offense of bastardy was arrested, examined, and required to enter into a recognizance in the sum of \$500.00 for his appearance at the next term of the district court of Gage county to answer the charge. Having failed to enter into a recognizance as required he was committed to the jail of said county. He now applies for a writ of *habeas corpus* to release him from imprisonment upon the sole ground that it does not appear from the testimony that the prosecuting witness is an unmarried woman. It appears from the testimony of the prosecuting witness taken on the examination of the plaintiff, that she was married to one Henry Seilling seven years ago; that they lived together as husband and wife for four years; that about three years ago she was informed by Seilling's mother and other members of the family that he had a wife then living to whom he had been married prior to his marriage to the witness, and that Seilling in-

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formed her that such was the case at the time he abandoned her three years ago; that she had not obtained a divorce from him, and had not lived with him since she was informed that he had a wife then living. The position of the attorneys for the petitioner, as we understand it, is that there is no testimony to prove that the prosecuting witness is an unmarried woman. To this we cannot assent. None of the testimony of the prior marriage of Seilling was objected to, and most of it was drawn out by the counsel for petitioner, and, while it tended to prove the facts alleged, was sufficient to justify the justice in requiring the petitioner to enter into a recognizance for his appearance before the district court. The proof clearly shows that the plaintiff is guilty of the offense charged, and should not be discharged unless there is a failure of proof on a material point. The writ must be denied.

WRIT DENIED.

11	100
26	419
11	100
30	842

THE STATE OF NEBRASKA, EX. REL. BALLENTINE, v. W.
S. PENISTON AND E. B. WARNER.

1. **Elections:** **CONTESTING ELECTIONS:** **NOTICE.** A notice of contest of election which states that the contestant was an elector of the district, the points of contest, the office contested, and the date at which its duties commenced, the person selected to take depositions, and the time and place of taking the same, is sufficient.
2. ———: **DEPOSITIONS.** The persons selected to take depositions, if they refuse to take testimony offered relating to the points of contest, may, after entering upon their duties, be compelled by mandamus to proceed.

ORIGINAL application for a peremptory writ of mandamus.

Galey & Abbott, for relator.

C. J. Greene and Hinman & Neville, for respondents.

MAXWELL, CH. J.

This is an application on notice for a peremptory writ of mandamus. The application states in substance that David C. Ballentine is an elector of the county of Frontier in the 26th senatorial district, and that on the 2nd day of November, 1880, at a general election in said county and district for the election of a state senator therein, to represent said district in the legislature of the state, he was legally elected to said office, and received a plurality of all the votes cast at said election in said district for said office; that Henry Snyder also is a resident of said senatorial district and claims to be elected to said office, but that he did not receive a plurality of the votes so cast and was not elected to said office; yet the board of canvassers issued a certificate of election to him certifying that he was elected thereto. That within twenty days next following said election the relator gave notice in writing to said Snyder that he would contest his election, which notice set forth the points upon which Snyder's election would be contested, and gave the name of W. S. Peniston, who is authorized by law to administer oaths, as the person selected by the relator to take testimony in the case, and said notice designated the time and place for taking said testimony; that said Snyder selected one E. B. Warner to assist in taking the evidence in the case. That at the time and place designated the defendants entered upon the duties of their office, and after they had accepted such appointments they refused to receive the testimony offered by the relator upon the ground that the notice of contest was insufficient,

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and thereupon dismissed the proceedings. A copy of the notice is set forth in the application. The defendants demurred to the application, alleging particular grounds of demurrer, the substance of which is that the facts stated in the application are not sufficient to entitle the relator to the relief prayed for.

The statute provides that "whenever any elector of this state chooses to contest the validity of the election of any of the officers of the executive department of the state, or whenever any elector of the proper county or district chooses to contest the election of any member of the legislature from such county or district, such person shall give notice thereof in writing, read such notice to and leave a copy thereof with the person whose election he intends to contest, within twenty days after the election; if the person cannot be found in his district, then a copy to be left at his last place of residence in the district, naming the points on which the election shall be contested, and the name of some person authorized by law to administer oaths selected by him to take the depositions, and the time and place of taking the same." Laws 1879, 261.

The statute provides upon what grounds an election may be contested, and the grounds set forth in the notice are among those therein provided. The notice states in substance that the contestant is an elector of the district, and states the points of contest, the office contested, and the date at which its duties commence, the person selected by the contestant to take depositions, and the time and place of taking the same. This is sufficiently definite in its statements to comply with the requirements of the statutes. The objections to the notice are therefore not well taken.

The statute requires the two persons selected as above provided to proceed jointly to take the depositions, or in default of either of such persons to attend

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at the time and place fixed upon, the one attending shall proceed to hear and reduce to writing the testimony of all the witnesses who may be produced by either of said parties, and may adjourn from day to day until all of such testimony shall have been taken and reduced to writing; provided that all the testimony shall be taken on or before the twenty-sixth of December following.

It is also provided that no testimony shall be received by the persons thus selected to take depositions on the part of the contestant which does not relate to the points specified in the notice. This provision would seem to give the persons selected to take depositions power to determine what testimony was applicable to the points specified in the notice. But as no objection is made on that ground it is unnecessary to consider it. It is the duty of the defendants to proceed and take the testimony offered by the contestant relating to the points specified in the notice and such testimony as may be offered by the contestee, and reduce the same to writing. A peremptory writ of mandamus will therefore be issued as prayed.

JUDGMENT ACCORDINGLY.

THE STATE OF NEBRASKA, EX REL. GEORGE E. WILLARD,
v. O. E. STEARNS AND OTHERS.

Relocation of County Seats: CANVASSING VOTES. On the organization of N. county, the special commissioners appointed by the governor called an election for the election of officers and the location of the county seat, and in canvassing the votes cast at such election threw out forty votes cast for a certain point as county seat, thereby giving F. a majority of all the votes cast. *Held*, That the commissioners had no authority to reject votes, and that a mandamus would lie to compel them to canvass all the votes cast, and that the remedy by contest was not exclusive and in many cases was not an adequate remedy.

ORIGINAL application for mandamus.

M. H. Sessions and Sibbett & Fuller, for relator.

T. M. Marquett, C. J. Dilworth, and Reese & Gilkerson, for respondent.

MAXWELL, CH. J.

It appears from the record that on the sixteenth day of June, 1879, it having been made to appear to the governor by the affidavits of three resident freeholders of Nance county that said county contained a population of not less than two hundred inhabitants, and that ten or more of the same were tax payers therein who petitioned the governor to appoint O. E. Stearns, George S. McChesney, and J. W. Whitney to act as special county commissioners in and for said county. That thereupon the governor did appoint the persons above named special commissioners, who qualified and entered upon the duties of their office. Said commissioners thereupon divided said county into five precincts, and on the twentieth day of September, 1879, fixed upon the fourth day of November, 1879, as the

11	104
15	443
16	40
17	61
17	65
17	66
17	176
17	567
17	568
22	324
22	331
24	140
24	522
11	104
25	206
25	343
11	104
28	630
29	430
11	104
34	44
11	104
36	104
11	104
43	838
11	104
46	87
46	623
46	674
46	736
11	104
51	234
51	780
11	104
60	420

The State v. Stearns.

time for holding an election for the various precinct and county officers of said county, and for the permanent location of the county seat. That on the question of the location of the county seat there were two hundred and two votes cast, of which the north half of sec. 18, township 17 north, range 4 west, received 95 votes; the north-west quarter of sec. 7, township 17 north, range 5 west, 15 votes; Fullerton eighty-nine votes. That upon a canvass of the votes, by the defendants, forty votes which had been cast in Genoa precinct for the location of the county seat on the north half of sec. 18, township 17 north, range 4 west, were thrown out and not counted by said defendants, the rejection of which votes gave Fullerton a majority of all the votes cast, and it was thereupon declared the county seat. It is now sought to compel the defendants to reassemble and perform their duty by canvassing all the votes returned.

A number of defenses are interposed, the principal of which are: *First*, That the matter has already been adjudicated. *Second*, That the relator does not show a sufficient interest to bring and maintain the action. *Third*, That the defendants have no further power or authority in the premises. *Fourth*, There is a plain and adequate remedy at law by contest.

It appears from the record that proceedings were instituted in the district court of Merrick county to compel the defendants to canvass the votes in question, which proceedings were afterwards dismissed. The grounds of the motion were irregularities in the proceedings, and the motion seems to have been properly sustained, as, in addition to the grounds therein set forth, it is clear that the court had no jurisdiction. There has therefore been no adjudication upon the merits of the case, and the proceedings referred to are not a bar to this action.

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The objection that the relator cannot maintain the action is not well taken. When the question presented is one of public right, and the object of the action is to enforce the performance of a public duty, it is sufficient for the relator to show that he is a citizen, and as such interested in the execution of laws. *Hall v. The People ex. rel.*, 57 Ill., 313. *State v. Judge*, 7 Iowa, 202. *Hamilton v. The State*, 3 Ind., 458. *The People v. Halsey*, 37 N. Y., 348. *State v. Shropshire*, 4 Neb., 418. Sufficient appears in the application to show that the relator is a citizen and interested in the execution of the laws. This statement should have been made in the alternative writ also, as the writ must contain a statement of all the facts relied upon to entitle the party to the relief prayed for. But the objection is to the want of legal capacity of the relator to sue, and, unless objected to by demurrer or answer, is waived. There being no objection on this ground in the answer it is too late now to insist upon it.

The third objection, that the defendants have no further power or authority in the premises is insufficient. They accepted the office of special commissioners, and took an oath to faithfully discharge the duties thereof. One of the duties imposed upon them was that of canvassing the votes cast at the first election. This they have not done. It is no answer to say that they canvassed a part of the votes. It was their duty to canvass the entire number cast. They had no authority to reject any portion of the returns and refuse to receive them. Their duties were purely ministerial. *Hagge v. The State*, 10 Neb., 51. *State v. Hill*, Id., 58. To permit a board of canvassers to throw out votes or reject returns upon some pretext, and thus defeat the will of a majority of the electors and change the result of an election, leads to lawlessness and violence, and if carried out in all elections in the state for any con-

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siderable period of time, would make elections a farce and byword. The act is none the less to be condemned because confined to a particular county. If the commissioners can reject forty votes why may they not reject one hundred or two hundred, and declare that some point in which perhaps they have an interest, and which received but one or two votes to have a majority of all the votes cast, and to be the county seat? Such a proceeding would at once be declared a gross violation of duty, yet it differs only in degree from the case at bar. A majority of the electors of Nance county have not yet designated any point as their choice for the county seat.

The objection that the relator has a plain and adequate remedy at law is untenable. The 6th subdivision of section 64 of the act to provide a general election law, approved March 1st, 1879, provides that an election may be contested "for any error in any board of canvassers in counting the votes, or in declaring the result of the election if the error would change the result." Laws 1879, 260. It is very clear from an examination of the statutes that it was not intended that this remedy should be exclusive. It is merely one of the grounds of contest, but it is equally so without the aid of the statute. But in many cases the mode here provided is not a plain and adequate remedy. Without attempting to define what is a full and adequate remedy at law, which must in a great degree be determined from the facts and circumstances of each case, I think all the cases agree that the mere fact that an action will lie does not supersede the remedy by mandamus. If the remedy by action is not a plain and adequate remedy, a mandamus should be awarded. If a person has received a majority of all the votes cast for an office, which, if canvassed, will entitle him to a certificate of election, why should he be compelled to

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appear as contestant for an office to which on the face of the returns he is entitled? A remedy by contest in such case is not an adequate remedy. So in case of an election for a county seat, where no point has a sufficient number of votes to be designated as the county seat, it is the duty of the county commissioners to call another election, and in such cases the remedy by contest is ordinarily too circuitous and is not an adequate remedy. A peremptory writ will therefore be awarded as prayed.

LAKE, J., dissents.

JUDGMENT ACCORDINGLY.

11	108
21	618
11	108
29	197

WILLIAM R. TURNER, PLAINTIFF IN ERROR, v. SAMUEL O'BRIEN, DEFENDANT IN ERROR.

1. **Malicious Prosecution: EVIDENCE.** The defendant, in an action for malicious prosecution, alleged in justification that he was the owner of grain purchased at sheriff's sale, and that plaintiff knowing this, took a portion thereof, threshed, and hauled it away, and that defendant upon the advice of a competent attorney caused the arrest of plaintiff for larceny. It appeared in evidence that after the defendant had purchased the grain and commenced its threshing, he was stopped by an injunction issued in behalf of another party claiming to be the rightful owner, who employed the plaintiff to thresh and store it, upon the doing of which defendant had caused his arrest. *Held*, 1. That the petition, injunction bond, report of referee, and receiver's bond in the injunction suit, as well as evidence of the plaintiff in that suit concerning it, were inadmissible. 2. That testimony of plaintiff offered to prove that he "acted in good faith in threshing the grain, and without intent to steal the same," was properly excluded. 3. That testimony offered to show that defendant did not call on plaintiff or the defendant in execution, whose grain he had purchased, and make inquiries of them concerning it, was no evidence of bad faith on his part, and inadmissible. 4. That to entitle plaintiff to recover he must prove not only malice but want of probable cause by the defendant in causing his arrest.

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2. **Practice:** INSTRUCTIONS TO JURY. The assumption by the court in its charge to the jury of a fact of which there is no evidence is error.

ERROR to the district court of Dodge county. It was an action by Turner against O'Brien to recover damages for causing the said Turner to be arrested and imprisoned on a charge of grand larceny. The defendant alleged in justification that he was the owner of grain purchased at sheriff's sale, and that plaintiff knowing this, took a portion thereof, threshed, and hauled it away, and that defendant upon advice of a competent attorney caused the arrest and imprisonment of plaintiff. It appeared in evidence that after O'Brien had purchased the grain and commenced its threshing, he was stopped by an injunction issued in the case of Brown against O'Brien (4 Neb., 195), Brown claiming to be the rightful owner, who employed the plaintiff in this suit to thresh and store the grain, upon the doing of which defendant had caused his arrest. The case came up here in 1877, and is reported in 5 Neb., 542. The present trial, before Post, J., and a jury, resulted in a verdict for defendant, and Turner again brought the cause up for review upon a petition in error.

N. H. Bell, for plaintiff in error, cited 2 Greenleaf on Ev., sec. 455. *Merriam v. Mitchell*, 13 Me., 439. *Stevens v. Fasset*, 27 Id., 266.

W. A. Marlow, for defendant in error.

COBB, J.

The plaintiff in error presents eight points in his petition in error.

"1. That the court erred in excluding from the jury, as evidence for the plaintiff, the injunction bond

given by James D. Brown in the suit of said Brown against defendant O'Brien et al."

I cannot conceive how the injunction bond could have properly been admitted as evidence in the case. The grain having been taken away by Turner, who acted for Brown and under his employment, Brown, and probably Turner also, was liable to O'Brien for its value in case he was successful in the suit in equity which was brought to test the ownership of the grain. They were both responsible. But suppose the grain had been stolen by some unknown person, would the sureties on the injunction bond have been holden for the value of it? I think not. "In estimating damages sustained by the improper issuing of an injunction

* * * it may be said generally that nothing will be allowed which is not the actual, natural, and proximate result of the wrong committed. * * *

In other words the liability upon the injunction bond is limited to such damages as arise from the suspension or invasion of vested legal rights by the injunction. Speculative and remote damages are not properly allowable, nor are those which are merely consequential, the limit being such damages as flow directly from the injunction as its immediate consequence." High on Injunc., sec. 964, and authorities there cited. Therefore I do not think the injunction bond was any security to O'Brien against the loss of said grain by theft or trespass; nor that he should by reason of it have relaxed in the least in his vigilant care of said property. If I am not wrong in this view then the existence of said bond was entirely inconsequential, so far as the issue in this case was concerned, and it was quite irrelevant as evidence.

"2. The court erred in excluding from the jury the testimony of Wm. R. Turner and Thomas M. Boyer, offered by plaintiff in rebuttal, and tending to show

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that both Turner and Boyer lived in the vicinity of the place where the grain was threshed, for the threshing and hauling away of which they were arrested, and tending to show that defendant O'Brien, in going to the neighborhood where the threshing was done, would necessarily pass close by Turner's and Boyer's houses, and to show that he did not call on Turner nor Boyer, nor ask any explanation of them or either of them as to who had done the threshing or why it was done."

It is claimed by the plaintiff in error in his brief, that the testimony referred to under this head would tend to show that O'Brien did not act in good faith, otherwise he would have called on Turner and Boyer and made inquiries of them as to what had become of the grain. It appears to me that in order to take that view we must first assume that O'Brien was merely acting a part; then, in order to overcome that assumption, we might say that he ought to have inquired of everybody in the neighborhood, including Turner and Boyer. But viewing the matter without such an assumption, and considering O'Brien's own testimony on that subject, it does not appear that his failure to call on Turner and Boyer, or to make inquiries of them, was any evidence of bad faith on the part of O'Brien whatever. He had learned from Irvin and Compton, about the middle of October, that Turner and Boyer were threshing the grain, and that Turner claimed to have been appointed receiver, and had given \$1,500 bonds. Two or three days after that he saw Turner himself, who informed him that he was threshing out the grain, and that it was turning out well. So there could have been no occasion for his calling upon Mr. Turner at his residence, nor upon Boyer, to inquire as to who had taken the grain away. Nor do I think it any evidence of bad faith on his part that he did not call on them to inquire by what au-

thority they had taken it. He knew that they had no authority from him, and he knew that Turner had authority from Brown, his opponent in litigation over the ownership and possession of the grain, and I think that it was no evidence of bad faith on his part that he did not apply for information on the subject to the employer of his opponent.

"3. The court erred in not allowing the plaintiff Turner to testify, as he offered to do, that in threshing the grain he acted in good faith, and without intent to steal the same, and as the agent of Dennis, receiver."

The question of Turner's good faith in threshing the grain was not before the jury. That he was not guilty of larceny, the crime for which he was prosecuted, was established by his discharge by order of the court in Washington county upon the failure of the grand jury to indict him, and no further inquiry on that point was necessary or proper. His method of threshing and hauling the grain, whether done in an open and public manner, as tending to show the want of good faith on the part of O'Brien in charging him with having stolen it, was pertinent and proper to be proved, but the secret intent of Turner in threshing and removing the grain is irrelevant in this case.

"4. The court erred in excluding from the jury the two receiver's bonds offered by the plaintiff."

One of the bonds above referred to was approved and filed February 14, the other May 16, 1873. The information against Turner and Boyer before the justice was filed by O'Brien January 14, 1873. The said receiver's bonds had no existence at that time, nor at the date of the alleged conversion of the grain, and so could not have been considered by O'Brien in making up his mind as to the right of Turner to remove the grain, or as to the intent with which it was removed if he had no right; and as the main questions before

the district court in this case were whether there was probable cause for making the said information and whether the same was made maliciously, I think that the said receiver's bonds were properly excluded.

"5. The court erred in admitting in evidence on behalf of defendant O'Brien, the answer, summons, report of the referee, and journal entry in the case of James D. Brown v. Samuel O'Brien et al."

The said answer was filed on the 17th of May, 1873; the report of the referee was filed on the 12th December, 1873; and the journal entry made April 30, 1874, all of which dates are long subsequent to that of the criminal prosecution, which is the cause of action in this case. I do not see how they could possibly shed any light for the guidance of the jury upon the questions at issue. Whatever facts were alleged in the answer found by the referee and affirmed by the judgment of the court, might or might not be material in the case if proved by competent testimony, but they could not, as I understand the rule of evidence, be proved by the said records in a suit between these parties. And I think that probably this testimony was prejudicial to the plaintiff. As claimed by plaintiff in his brief, it presented a new and false issue to the jury, distracted their minds from the real one, and may have misled them in reaching the conclusion to which they arrived in this case. For these reasons I think there should be a new trial.

"6. The court erred in admitting in evidence on behalf of defendant O'Brien the answer to the cross-interrogatory No. 1, in the deposition of James D. Brown."

The plaintiff took the deposition of James D. Brown and examined him upon certain points in his answer to which he necessarily spoke of the suit which he had instituted in equity against O'Brien and others concern-

ing the grain in question, and in which the injunction was issued. On cross-examination the counsel for defendant put but one question to the witness, which was as follows:

"Q. This suit of yours against O'Brien in the district court of Dodge county in regard to the title of the grain in controversy was decided against you in that court, was it not?" Under objection on the part of the plaintiff, witness answered: "It was, and has been appealed to the supreme court."

We have already seen, while examining this question under another head, that the result of the suit between Brown and O'Brien et al. could not have affected the good or bad faith with which the criminal prosecution, for which this suit was brought, was instituted by the defendant O'Brien. And while I think the question and answer now under consideration as entirely irrelevant, the answer may have been, and probably was, regarded by the jury as important, and taken in connection with the record evidence in that case, which I have heretofore discussed as having been improperly admitted, it probably led the jury to a consideration of the issues involved in that case, to the exclusion of those of the case which they were then trying.

Two of the remaining points deemed proper to notice, urged by the plaintiff, arise upon the instructions given in charge to the jury, and those prayed by the plaintiff, but refused.

The eighth instruction is, I think, open to the objection urged against it by counsel. It does assume that there is evidence before the jury from which they might find "that at the time the defendant commenced the prosecution against the plaintiff Turner, on the charge of larceny before the magistrate, he had been informed that the plaintiff Turner, either alone or with

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others, had committed or was at that time committing larceny upon the grain of defendant O'Brien," etc., when in fact there was no evidence that such facts had been communicated to him. He had been informed that plaintiff, with others, were threshing out and hauling away the grain, and that Turner had been appointed receiver, given bond, etc. He was afterwards informed that Turner had not been appointed receiver. The point is that the charge leaves the jury to infer that the court considered these facts, put together, as equivalent to information that the defendant had committed or was committing larceny upon the wheat, etc.

When this case was before this court on error from a former trial, the court in the opinion said: "It is the duty of the court to determine whether such fact, if found, constituted probable cause or a reasonable ground of suspicion, sufficient to warrant a cautious man in the belief that the plaintiff was guilty of larceny; and it was error to submit this question to the jury." *Turner v. O'Brien*, 5 Neb., 542.

There is no material conflict of testimony in this case on the point of probable cause, and that being the case I think that the court should have told the jury whether such testimony was sufficient to show probable cause or not.

I cannot agree with counsel for the plaintiff in his views upon his request No. 4, refused by the court. The portion of the charge insisted on by the plaintiff is in the following words: "And it is not sufficient that O'Brien really believed that a crime had been committed when, in truth, the facts within his knowledge constituted no crime. Good faith merely is not sufficient to protect defendant O'Brien from liability, for good faith merely, may be based on mere conjecture or unfounded suspicion supported by no circumstances. The belief or suspicions must be reasonable.

Worden v. Marsh Harvester Company.

Such as would be entertained by a cautious and prudent man."

The substance of the above is inconsistent with the first charge given by the court, as well as with No. 1 of the charge prayed by plaintiff, which agree in this, that to entitle the plaintiff to recover he must prove two things—or that two things are essential—malice and want of probable cause. In one of the charges the court defines malice to be the opposite of good faith, and I see no objection to that definition. But if we admit good faith we thereby admit the absence of one of these essential things—malice. The two cannot exist together.

The only other remaining point urged by the plaintiff is, that the evidence does not sustain the verdict. As for reasons above stated I have reached the conclusion that there must be a new trial, I express no opinion on this point.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

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REVERSED AND REMANDED.

B. A. WORDEN AND OTHERS, PLAINTIFFS IN ERROR, V. SYCAMORE MARSH HARVESTER CO., DEFENDANTS IN ERROR.

Warranty. In an action on certain notes given for a harvester, the defense was a breach of warranty. It appeared from the testimony that the parties relying on the warranty had wholly failed to comply with its terms or conditions precedent. *Held*, that the defense was not available.

ERROR to the district court of Boone county. Tried below before BARNES, J.

Nelson & Dalton, for plaintiffs in error.

Wm. T. Searles and W. M. Robertson, for defendant in error.

MAXWELL, CH. J.

This action is founded upon certain promissory notes given by the plaintiffs in error to the defendant for a reaper, known as the "Marsh Harvester." The defense is a breach of warranty. On the trial of the case in the court below the jury returned a verdict in favor of the defendant in error for the sum of \$225.81, upon which judgment was rendered. The defendants below now bring the cause into this court by petition in error.

It appears from the testimony that in July, 1876, B. A. Worden purchased of one Stanton the machine in question. The machine was set up and started by Stanton, who informed Worden that there was a warranty of the machine, such as he had given, in the tool box. This warranty Worden admits was there as stated, but he testifies he never read it, and its exact contents do not appear. But it is very clear from the testimony of the plaintiffs in error that there has been no attempt on their part to comply with any of its terms or conditions precedent. This is essential. There must be a reasonable compliance with conditions precedent in a warranty before it can be enforced against the warrantor. *Nichols v. Hail*, 4 Neb., 210. *Miller v. Nichols*, 5 Id., 478. There is no material conflict in the testimony in the case, and the court would have been justified in directing a verdict for the defendant in error. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

11	118
11	122
14	893
11	118
44	606
11	118
49	769

HARVEY B. DENSMORE, PLAINTIFF IN ERROR, V. A. C.
TOMER, DEFENDANT IN ERROR.

Sale: FRAUD: VENDOR AND VENDEE: BURDEN OF PROOF. The retention of the possession of goods by the seller in case of an absolute sale, is, as against creditors, only *prima facie* evidence of fraud. In such case it puts upon the vendee the burden of satisfying the jury that the sale was fair and entered into in good faith.

ERROR to the district court of Stanton county. Tried below before BARNES, J.

M. McLaughlin and *J. C. Crawford*, for plaintiff in error, cited *Bump on Bankruptcy*, 6th Ed., 385. *McKibbin v. Martin*, 64 Penn. St., 352 (3 Am., 588). *Ingalls v. Herrick*, 102 Mass., 351 (11 Am., 360). *Marsh v. Armstrong*, 20 Minn., 81 (18 Am., 355).

E. P. Weatherby and *W. M. Robertson*, for defendant in error, cited *Ketchum v. Watson*, 24 Ill., 591. *Luke v. Morris*, 30 Conn., 301. *Cadbury v. Nolen*, 5 Penn. State, 320. *Dewart v. Clement*, 48 Id., 413. *Burrows v. Stebbins*, 26 Vt., 650. *Vance v. Boynton*, 8 Cal., 554. *Monroe v. Hussey*, 1 Oregon, 188. *England v. Commercial Insurance Co.*, 16 La. Ann., 5. *Brown v. Keller*, 2 Grant, 144. *Bump on Fraudulent Conveyances*, 60-108.

MAXWELL, CH. J.

This is an action to recover from the defendant, who was assignee in bankruptcy of the property belonging to the firm of Densmore and Hopper, the value of certain property taken by him as assignee. In the year 1876 the plaintiff was a resident of the state of Illinois, and the firm of Densmore and Hopper was doing busi-

Densmore v. Tomer.

ness at Stanton, in this state. In October of that year, C. M. Densmore, the senior member of said firm and a son of the plaintiff, applied to him, at his residence in Illinois, to purchase the stock of goods belonging to the firm. It is claimed that a sale was effected for the sum of \$1,500—\$1,000 in cash, and \$500 in an antecedent debt, being between \$200 and \$300 more than the goods were worth, the surplus to be used to purchase more goods. The son was to remain in possession, sell the goods, receive pay for his services, and retain a living for his family out of the proceeds of the sale. The plaintiff had never seen the goods at the time of the purchase, and there was no actual change of possession, C. M. Densmore continuing to sell the goods in the same manner after as before the sale. At the time of the sale the firm of Densmore and Hopper were indebted in a considerable amount to various parties and firms, a large portion of which would become due in a few months after the sale. While there is some conflict in the testimony it is pretty clear that the plaintiff had notice of these facts at the time he purchased. In the year 1877, Densmore and Hopper were adjudged bankrupts on their own petition, and the defendant being appointed assignee took the goods in controversy as the property of the bankrupts. The plaintiff thereupon instituted an action to recover the value of the same. On the trial of the cause the jury found in favor of the defendant. The plaintiff brings the cause into this court by petition in error. The errors relied on in the plaintiff's brief are: *First*, That the verdict is not sustained by sufficient evidence. *Second*, That the matters in controversy were adjudicated in the United States district court.

It will thus be seen that the principal facts in the case are very similar to *Twyne's Case*, 3 Coke, 80. The question presented is this: Where there is an

absolute sale of personal property, when the vendor at the time of the sale is in possession of the same, must there be an actual change of possession, so far as the property sold is susceptible of it, in order that the sale may be valid as against creditors then existing?

Section 70 of chapter 43 of the Revised Statutes of 1866 provides that "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage and security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the persons making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment, that the same was made in good faith and without any intent to defraud creditors or purchasers." Gen. Stat., 393.

The proper construction of this section was before this court in the case of *Robison v. Uhl*, 6 Neb., 333. The court say: "Under the operation of this section it will be seen that the decisions of the courts of those states where the rule of the common law prevails cannot be followed. Under our statutes the retention of possession by the seller is, at most, only *prima facie* evidence of fraud, which may be entirely rebutted by the circumstances attending the transaction." This we regard as a proper construction of the section quoted. The mere retention of possession by the vendor is regarded as *prima facie* evidence of fraud against his creditors, and is void as to them unless the vendee shall prove the transaction to have been *bona fide*—that

 Miller v. Morgan.

is, it puts upon the vendee the burden of satisfying the jury that the sale was fair and entered into in good faith. The question of fraudulent intent is one of fact to be determined from the evidence in the case. In but few instances can fraud be established by direct testimony, and ordinarily it must be proved by circumstantial evidence. In the case at bar the entire evidence connected with the transaction was before the jury, and no objections are now made to the rulings of the court in admitting or rejecting the same. Neither are objections made to the instructions given by the court. Such being the case we find it impossible from the nature of the testimony to say that the verdict is wrong. So with regard to the prior adjudication, it is very clear that the matters in issue in the former case were not between the parties to this action, and they are not bound by such adjudication. There is no error in the record and the judgment must be affirmed.

JUDGMENT AFFIRMED.

JAMES P. MILLER, PLAINTIFF IN ERROR, V. MORGAN &
GALLAGHER, DEFENDANTS IN ERROR.

11	121
43	229
11	121
49	769

Sale: FRAUD: RETENTION OF POSSESSION BY SELLER. The retention of the possession of goods sold by the seller is merely *prima facie* evidence of fraud which may be entirely rebutted.

ERROR to the district court of York county.

Galey & Abbott, for plaintiff in error.

France & Sedgwick, for defendants in error.

MAXWELL, CH. J.

In December, 1878, one B. F. Knapp, the owner of a store in York county, being indebted to the defend-

ants in error in the sum of \$926, sold them all the goods belonging to him in the store for the sum of about \$600, which amount was to be credited on the indebtedness. There was no change in the possession of the goods. Knapp continued to sell the same in the ordinary course of business, claiming to be acting as the agent of the defendants in error. In January, 1879, an action by attachment was commenced against Knapp, and the goods in question were levied upon as his property. The defendants in error thereupon replevied the goods from the sheriff, plaintiff in error. On the trial of the cause a jury was waived and the cause submitted to the court, which found in favor of the defendants in error, and assessed their damages at the sum of \$5. The plaintiff in error thereupon filed a motion for a new trial, which being overruled, he now brings the cause into this court by petition in error.

The questions involved in the case were passed upon by this court in the case of *Robison v. Uhl*, 6 Neb., 328, and *Tomer v. Densmore*, ante p. 120. It was held in those cases that the statute had changed the common law rule, and that the retention of the possession by the seller of the goods sold was only *prima facie* evidence of fraud, which might be entirely rebutted by circumstances. But in such case it devolves upon the purchaser to prove to the court or jury that he is a *bona fide* purchaser. This the defendants in error introduced evidence to establish, and a clear preponderance of the testimony sustains the finding. There is no error in the record. The judgment must therefore be affirmed.

JUDGMENT AFFIRMED.

Day v. Thompson.

LAVINIA E. DAY, APPELLEE, v. CHARLES L. THOMPSON,
APPELLANT.

11	123
13	620
14	368
16	410
17	482
20	850
11	123
32	39
11	123
48	581

Equity: TITLE BY ATTACHMENT PROCEEDINGS. In May, 1857, one U. entered a tract of land in Douglas county, and in September of that year mortgaged one half of the same for \$675, payable in eighty-seven days. The mortgage was recorded, and afterwards, on the twentieth of March, 1858, was assigned to one R., who advanced an additional sum to U. on the land, and took an assignment of the certificate. On the twelfth of April, 1858, an action by attachment was commenced against U., and the land in question attached, service being had by publication. Judgment was thereafter recovered, the lands sold, the sale confirmed, and a deed ordered, but no deed executed. In 1863, 1870, and 1876, motions requiring the sheriff to execute a deed were sustained, and a deed was made in 1876. In 1866, R. took a conveyance of the land from U., and in 1868 conveyed to D. Held, in an action by the heir of D. to quiet title, that the attachment proceedings divested U. of title and were notice to third persons of the pendency of the action.

APPEAL from the district court of Douglas county.
Tried below before SAVAGE, J.

E. Wakeley and Leavitt Burnham, for appellant, cited *Galway v. Mulchow*, 7 Neb., 285. *State v. S., C. & P. R. R.*, 7 Neb., 357. *Swiggart v. Harber*, 4 Scam. (Ill.), 364. *Cunningham v. Cassidy*, 17 N. Y., 276. *Drake on Attachment*, secs. 228, 239. *Laws of Neb.*, 1855, p. 164. *Id.*, 1856, p. 86. *Id.*, 1858, p. 178. *Wade on Notice*, Chap. V. Sec. 85, Neb. Civil Code. *Story Equity*, Sec. 405. *Doe v. Harter*, 2 Ind., 252. *Crowell v. Meconkey*, 5 Penn. State, 168. *Emley v. Drum*, 36 Penn. State, 123. *Fine v. St. Louis Public Schools*, 30 Mo., 166. *Lessee of Paine v. Mooreland*, 15 Ohio, 436. *Bronson v. Kinzie*, 1 How., 311. *McCracken v. Hayward*, 2 Id., 608. *Edwards v. Kearzey*, 96 U. S., 595. *Lessee of Seawell and Jones v. Williams*, 2 Overton, 274. *Rosier v. Hale*, 10 Iowa, 470. *Snowden & Co. v. Craig*,

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26 Iowa, 156. *Koehler v. Ball*, 2 Kan., 160. Rorer on Judicial Sales, sec. 132. *Parrat v. Neligh*, 7 Neb., 456. *Berkley v. Lamb*, 8 Neb., 392.

Redick & Connell, for appellee, cited *Hoadley v. Stephens*, 4 Neb., 431. Rorer on Judicial Sales, secs. 798, 913, 927, 934, and cases cited. *Gahway v. Malchow*, 7 Neb. 285. *Dorsey v. Hall*, Id., 465. *Mansfield v. Gregory*, 8 Neb., 432.

MAXWELL, CH. J.

This is an action to quiet title. A decree was rendered in the court below in favor of the plaintiff, from which the defendant appeals to this court.

It appears from the record that on the 12th day of May, 1857, one Henry W. Underhill entered by pre-emption the south-east quarter of section 6, in township 15, range 13 east, in Douglas county; that on the 12th day of September, of that year, he executed a mortgage upon the west half of said land to one F. M. Aiken, cashier of the Bank of Tekamah, to secure the payment of the sum of \$672.06 in eighty-seven days from that date. The mortgage was duly recorded. On the 10th of December, 1857, Aiken assigned the above mortgage to one Reed, who, on the 20th of March, 1858, advanced an additional sum on the land, and took an assignment from Underhill of the certificate of entry of the land in question, and also a contract that Underhill and wife would convey said land to him upon receiving a patent therefor. None of these transactions were recorded. On the 19th of September, 1866, Reed purchased the land in question from Underhill and received a deed therefor, which was recorded on the 4th day of December of that year. On the 16th day of January, 1868, Reed, for a valuable consideration, conveyed the land in question to one Isaac C.

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Day, and afterwards, upon the death of Day, the plaintiff succeeded to his rights therein, and now claims to be the owner of said land. On the 12th day of April, 1858, C. M. McClung & Co. commenced an action by attachment in the district court of Douglas county, against H. W. Underhill, to recover the sum of \$1073.21 and costs of suit. The petition set forth that the defendant was a non-resident of the territory. A bond for an attachment was duly filed and approved, and a writ of attachment issued and was levied upon the land in controversy. On the 21st of September of that year notice of the pendency of the action was ordered to be published in the Omaha Times, and publication thereafter had, and on the 8th of October following, an affidavit of publication having been made, was duly filed, and on the 30th day of the month judgment by default was rendered against Underhill for the sum of \$1254.31 and costs, but there was no order for the sale of the attached property. On the 4th day of April, 1859, an execution was issued on the judgment, and levied upon the land in question, and the same was sold to Thompson for the sum of \$400.00. On the 3rd day of November, 1859, the sale was confirmed, and the sheriff ordered to make a deed to the purchaser. From some cause which does not appear in the record the sheriff failed to make the deed as required, and additional orders to that effect were made in 1863, 1870, and 1876, and in the year last named a sheriff's deed was made to Thompson for the land in controversy. The land is uncultivated, and no improvements whatever have been made thereon. The plaintiff commenced this action in 1877.

But two questions are presented by the record. *First*, Had the court issuing the attachment and rendering judgment jurisdiction? *Second*, If it had, was the pendency of the proceedings notice to purchasers

of the land? The defendant in that action being a non-resident of the territory, the court obtained jurisdiction, if at all, by an attachment of his property.

Section 1, of Chapter XXXI, of the Code of Nebraska, approved February 13, 1857 (Laws of 1857, page 98), provided that "In an action for the recovery of money, the plaintiff may cause any property of the defendant, which is not exempt from execution, to be attached at the commencement or during the progress of the proceedings by pursuing the course hereinafter prescribed."

"If it be subsequent to the commencement of the action a separate petition must be filed, and in all such cases the proceedings relative to the attachment are to be deemed independent of the ordinary proceedings, and only auxiliary thereto."

"The petition which asks an attachment must, in all cases, be sworn to. It must state, that as the affiant verily believes the defendant is a foreign corporation, or acting as such, or that he is a non-resident of the territory." * * * * * "If the plaintiff's demand is founded on contract the petition must state that something is due, and as nearly as practicable the amount, and when payable." "The amount thus sworn to is intended as a guide to the sheriff, who must, as near as the circumstances of the case will permit, levy upon property fifty per cent greater in value than that amount."

"Before any property can be attached as aforesaid, the plaintiff must file with the clerk a bond for the use of the defendant with sureties to be approved by the clerk, in a penalty at least double the value of the property sought to be attached, and in no case less than two hundred and fifty dollars if in the district court, nor less than fifty dollars if in a justice's court, conditioned that the plaintiff will pay all damages that

the defendant may sustain by reason of the wrongful suing out of the attachment."

All of these conditions were complied with, and the attachment was issued and levied upon the lands in controversy. It is very clear, therefore, that the court had jurisdiction.

As to notice to third parties, section 35, of chapter XXXI, of the code then in force, entitled, "Of real estate and the alienation thereof by deed," provided that "The register, when presented with an abstract of,

"1. Any judgment.

"2. A mechanic's lien.

"3. The service of an attachment.

"4. The levy of an execution, any of which establishes a lien upon real estate; or with,

"5. A notice of *lis pendens* in chancery, shall enter in a proper book, to be kept for that purpose, the substantial parts of such abstract, so as to show the names of the parties to such liens and notices, the amount of the judgment or indebtedness, by what court the judgment was rendered, or attachment or execution was issued, and in what court the suit in chancery is pending, together with a general description of the estate to be affected by the lien or notice." The notice required by the above section was filed in the manner required by law, and was sufficient.

The section quoted above was repealed by the code of 1858, which took effect April 1, 1859, which contains the following provisions: Section 77. "When summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency, and while pending, no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title."

Under the provisions of this section the pendency of the attachment was notice to third persons from the

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time of the publication of notice, and this notice continued during the pendency of the action. And the jurisdiction of the court continued until the deed was executed. Here was an attachment properly levied, a judgment for the amount due, a sale of the attached property, a confirmation of the same and an order for a deed. All this appeared on the records of the district court, and so far as it affected the title of the lands in controversy, was notice to the world. The case differs materially from one where an action is commenced affecting the title to real estate which is not prosecuted with diligence. In such case the failure to prosecute may be considered as strong evidence of the want of merit in the action. But here the action was prosecuted with diligence, judgment obtained, a sale made and confirmed, and the delay in the execution of the deed, so far as appears from the record, was not caused by the default of the appellant.

The objection that no appraisal was made before the sale does not render the deed void, nor render the order confirming the sale subject to attack in this collateral manner. If a motion to set aside the sale is still pending in the district court, that is the proper tribunal to determine what disposition shall be made of it, but it cannot be considered in this court.

As Underhill had no title in the lands in question in 1866, therefore none passed by his deed, and the appellee thereby acquired no title to the same. It follows that the judgment of the district court must be reversed and the cause dismissed.

REVERSED AND DISMISSED.

ELIZA W. LIGHT AND OTHERS, PLAINTIFFS IN ERROR, V.
LIVIA E. KENNARD, DEFENDANT IN ERROR.

11	129
21	290
11	129
24	168
11	129
46	863

1. **Practice: EXCEPTIONS.** The exceptions referred to in section 300 of the code apply only to the findings of fact or conclusions of law of the referee.
2. **Referee: MOTION FOR NEW TRIAL.** To obtain a review of the decision of a referee a motion for a new trial is necessary.
3. **Parent and Child: ADVANCEMENT TO CHILD.** Lands conveyed by a mother to her daughter as an advancement after the mother has contracted debts which she is thereby unable to pay, pass subject to such debts.

ERROR to the district court of Lancaster county.
Heard on exceptions to report of referee before
POUND, J.

Galey & Abbott, for plaintiffs in error, cited *Partelo v. Harris*, 26 Conn., 480. *Fifield v. Gaston*, 12 Iowa, 218. *Steele v. Ward*, 25 Iowa, 535.

L. C. Burr and J. R. Webster, for defendant in error, cited *Hanson v. Buckner*, 4 Dana, 252. *Bogard v. Gardley*, 4 Smedes & M., 302. *Mohawk Bank v. Atwater*, 2 Paige Ch., 54. *Young v. White*, 25 Miss., 146. *Bump on Fraudulent Conveyances*, 216. *Lyne v. Bank of Kentucky*, 5 J. J. Marsh., 545. *Constantine v. Twelves*, 29 Ala., 607. *Blakeney v. Kirkley*, 2 Nott & McCord, 544. *Clark v. Depew*, 25 Penn. State, 516.

MAXWELL, CH. J.

The defendant in error is a judgment creditor of Eliza W. Light, and filed her petition in the district court of Lancaster county, alleging the recovery of the judgment, the return of an execution unsatisfied, and the conveyance by Eliza W. Light to Lucy A. Light

of certain real estate, without consideration, after the debt upon which the judgment was recovered was contracted. The case was referred to R. D. Stearns, who filed a report in favor of the defendant. The plaintiff herein filed exceptions to the report, which were overruled by the court, and judgment was rendered subjecting the land to the payment of the judgment. The cause is brought into this court by petition in error. No motion to set aside the report and for a new trial was made in the court below, nor was the court asked to set aside the report. Certain objections, which are styled *exceptions*, were filed to the report wherein it is alleged that the petition does not state facts sufficient to constitute a cause of action; that the referee erred in admitting certain testimony; that the evidence will not support the findings of fraud; that the findings of facts will not support the conclusions of law; that the findings of the referee are not according to the prayer of the petition; that the reference was made without consent, etc.

Decisions made by a referee during the progress of a trial, such as rulings upon the admissibility of evidence, must be excepted to at the time. The exceptions referred to in section 300 of the code apply only to the findings of fact or conclusions of law of the referee, there being no opportunity to except orally to these during the trial. *Deming v. Post*, 1 Code R., 121. *Brewer v. Isish*, 12 How. Pr., 481. *Gilchrist v. Stevenson*, 7 id., 273. *Hunt v. Bloomer*, 13 N. Y., 341. These so called exceptions, therefore, do not take the place of a motion for a new trial, and no motion having been filed the case cannot be reviewed in this court. *Simpson v. Gregg*, 5 Neb., 237. The judgment must, therefore, be affirmed.

But aside from the question of practice, the judgment is clearly sustained by the evidence. It appears

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from the bill of exceptions that the debt for which the judgment was recovered was incurred on the 9th day of April, 1877, and the conveyance from Eliza W. Light to Lucy A. Light was executed on the 25th day of the same month, as an advancement. Lucy A. Light is not a *bona fide* purchaser of the premises, and they pass to her subject to the payment of the debts then existing of Eliza W. Light. There is no error in the record.

JUDGMENT AFFIRMED.

7-845

HAPGOOD & COMPANY, PLAINTIFFS IN ERROR, V. JERUSHA
A. ELLIS AND OTHERS, DEFENDANTS IN ERROR.

Pleading: FORECLOSING MORTGAGE: ANSWER: RES ADJUDICATA. In a foreclosure suit where several parties are made defendants as lien holders, subsequent purchasers, or lessees of the mortgaged premises, their several answers claiming rights as such lien holders, subsequent purchasers, or lessees, may be regarded also as cross-petitions for relief as against their respective co-defendants as well as against the plaintiff. And any such defendant, regularly served with process, who fails to answer any material allegation contained in the answer of his co-defendant is bound thereby as well as by the decree founded thereon, and unless he appeals therefrom the same becomes as to him *res adjudicata*.

ERROR to the district court of Fillmore county,
Tried below before WEAVER, J.

James P. Maule, for plaintiffs in error; cited Wells Res Adjudicata, secs. 251 to 281. *Barker v. Cleveland*, 19 Mich., 230. *Danaher v. Prentiss*, 22 Wis., 311. *Hackworth v. Zollars*, 30 Iowa, 438. *Le Guen v. Gouverneur*, 1 Johns. Cases, 492. *Doty v. Brown*, 4 N. Y., 71. *Castle v. Noyes*, 14 id., 329.

11	131
28	676
11	131
36	843
11	131
40	156
11	131
45	335
46	381
11	131
48	55
11	131
51	422
11	131
58	476

Eller & Chase, for defendants in error, cited *Reed v. Kemp*, 16 Ill., 445; *Talbot v. McGee*, 4 Monroe, 375. *Johnson v. Morrison*, 5 B. Monroe, 106. *Weisman v. Smith*, 6 Jones, Eq., 124. *Fletcher v. Holmes*, 25 Ind., 458. *Coit v. Tracy*, 8 Conn., 268. *Jackson v. Hazen*, 2 Johns., 22. *Nickerson v. California Stage Co.*, 10 Cal., 520. *Eastman v. Cooper*, 15 Pick., 276. 2 Smith's Leading Cases, 627.

COBB, J.

The pleadings in this case are voluminous, and in order to a proper understanding of the question involved, it will be necessary to recite them at tedious length.

The real estate in question was owned by C. Maxon Northrup, and while so owned by him, several judgments at law were recovered against him by different parties, among others the plaintiffs in error here, which judgments it is claimed by them became and were liens upon said real estate. Said Northrup conveyed said real estate in separate parcels and moieties to Susan F. Wells and Hattie E. Wells, and took mortgages back for the purchase money for the same. Afterwards the said Susan F. Wells conveyed her part and moiety of the said real estate to the said Hattie E. Wells, who afterwards conveyed the said real estate to the defendant in error, Jerusha A. Ellis. The defendant in error, James K. Ellis, is the husband of the said Jerusha A. Ellis, and J. W. Eller is the trustee of an express trust out of the said real estate.

On the 18th of October, 1877, the said Northrup commenced two actions in the district court of Fillmore county, for the purpose of foreclosing the said mortgages, one against the said Susan F. Wells and husband, the other against the said Hattie E. Wells

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and husband. The Ellis' and all of Northrup's judgment creditors were made defendants in each of said suits. The judgment lien holders and J. W. Eller, who was not an original defendant, answered in each of said cases. But neither of the Wells or Ellis, though duly served with process, answered in either of said suits. Thereupon the said causes were referred to a referee, according to the practice of the court. The referee, after examining the pleadings and evidence offered, made his findings and reports in substance that there was due to the said C. Maxon Northrup on one of the said mortgages the sum of \$1617.10, and on the other of said mortgages the sum of \$2160.70, and that the same was the third lien on the said premises. The said reports of the said referee were affirmed by the said district court, and decrees of foreclosure and sale made by the said court in each of the said causes. The petition further states that after the rendition of said decree the said Jerusha A. Ellis paid to the said C. Maxon Northrup and his assigns the whole amount of the said principal indebtedness, interest, etc. The petition also states that "the said Jerusha A. Ellis has fully paid all other notes described in and secured by the said two mortgages hereinbefore described, and upon which the said actions were founded, except the one therein described for \$661.10, due January 1, 1877, to Nicholas Nigh."

The said petition further states that in the said two causes of *C. Maxon Northrup vs. Charles Wells and others*, and same plaintiff *vs. George Wells and others*, which said causes were referred to W. H. Morris as referee, as hereinbefore stated, the said referee found the following facts relative to the interest of Hapgood & Co., plaintiffs in error herein, in each of said causes: "That there is due the defendants Hapgood & Company the sum of \$569.16, and that the same is a first lien on the

premises mentioned in plaintiff's petition." Which said report was confirmed. And the said petition contains the further allegations in reference to the said claim of Hapgood & Company: "That on the third of October, 1874, there was filed in the probate court of Fillmore county a complaint entitled *Hapgood & Co., plaintiffs, v. C. M. Northrup, doing business in the firm name of C. M. Northrup & Co.* * * That on the second day of November, 1874, W. H. Blain, probate judge, made of record, without evidence, an order that judgment be decreed in favor of the plaintiffs Hapgood & Co., and against the defendant C. M. Northrup, in the sum of principal, \$204.15, four months interest at ten per cent, \$6.80, and costs taxed at \$4.10; total, \$215.05; but did not then or after that time enter any judgment in said cause. And afterwards the following is made to appear of record in said cause: This judgment is satisfied by note of Wells secured by mortgage on mill at Fillmore, dated April 26, 1876, given to * * * plaintiff's attorney * * * That on the fourth day of January, 1875, there was filed in the probate court of Fillmore county a complaint entitled *Hapgood & Co., plaintiffs, v. C. M. Northrup.* That on the fourth day of January, 1875, H. P. Finnigan, probate judge, entered a pretended judgment upon the record in his docket, as follows: It is therefore ordered and adjudged by the court that said plaintiffs Hapgood & Co. have and recover of said C. M. Northrup the sum of eighty dollars, with interest from January 1, 1875, and costs of this suit, and that they have execution therefor * * And that afterwards the following was made to appear of record in such cause: "This judgment satisfied by note of Wells secured by mortgage on mill property at Fillmore, dated April 26, 1875, to * * * plaintiffs' attorney, for amount of this judgment." That on the fourth day of

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January, 1875, there was filed in the probate court a complaint entitled *Hapgood & Co. v. C. M. Northrup & Co.* That on the same day, H. P. Finnigan, probate judge, entered a pretended judgment upon the records in his docket as follows: It is therefore considered ordered and adjudged that said plaintiffs Hapgood & Co. have and recover of said C. M. Northrup the sum of \$204.10, with interest at ten per cent from Nov. 15, 1874, together with costs of suit, and they have execution therefor * * And that afterwards the following is made to appear of record in said cause: "This judgment is satisfied by note of Wells secured by mortgage on mill property at Fillmore, dated April 26th, 1875, for amount of this judgment given to *

* * " That afterwards, on the third day of July, 1875, there was filed in the clerk's office of the district court * * * in and for Fillmore county, a transcript of the docket of the said probate court in each of said causes, the same as herein set forth, except that part relating to the satisfaction of said judgments. That said transcripts or either of them were not at that time nor have the same since that time been entered upon the judgment record of the said district court, and that afterwards, to-wit, on the 3d day of April, 1879, that part of said transcript relating to the satisfaction of said judgment were filed in said office *

* * That on the — day of 187— the said judgment hereinbefore described and transcript to the said district court for the sum of \$80.00, was, by the attorney of record of Hapgood & Co., * * * fully satisfied, and receipted upon the execution docket of said district court * * * That on the 15th day of September, 1877, the said Hapgood & Co., by * * * attorney of record and attorney in fact, did by writing under seal duly acknowledged, release the said two other pretended judgments in favor of Hapgood & Co.

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and against C. M. Northrup * * * And said plaintiffs further show that on the 1st day of September, 1875, the said C. M. Northrup endorsed in blank and transferred and delivered to Hapgood & Company two promissory notes dated April 26, 1875, one due November 1, 1875, and one due January 1, 1876, each for the sum of two hundred and twenty dollars, with interest thereon at the rate of ten per cent per annum from the date thereof, and providing for attorney's fees and signed by George Wells, which notes were described and the payment thereof secured by the mortgage heretofore described and set forth * * *

That at the time said notes were so transferred and delivered to Hapgood & Company, the following was endorsed on the said note January 1, 1876: "When the within note is paid the first judgment against said Northrup in favor of Hapgood & Co. is to be satisfied in probate court * * * " That said note was received by Hapgood & Co. so endorsed about the 1st day of September, 1875, on account of the judgment against the said C. M. Northrup in favor of Hapgood & Co., * * * and upon the receipt thereof Hapgood & Co. contracted and agreed that when said note should be paid the said Hapgood & Co. would fully release and satisfy said judgment, and that the payment of said note should be in full satisfaction of said judgment. That at the time the said notes were transferred to said Hapgood & Co., the following was endorsed on the said note due November 1, 1875: "When the within note is paid the second judgment against said Northrup in probate court, in favor of Hapgood & Co. is to be satisfied * * * " That said note was received by Hapgood & Co. so endorsed, about the first day of September, 1875, on account of the judgment against the said C. M. Northrup in favor of Hapgood & Co. * * * and upon receipt thereof

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Hapgood & Co. agreed and contracted, that when said note should be paid the said Hapgood & Co. would fully release and satisfy said judgment, and that the payment of said note should be in full satisfaction of said judgment. That the said plaintiff, Jerusha A. Ellis, fully paid to the said Hapgood & Co. the said two promissory notes last hereinbefore described, and has the same in her possession, and now offers to bring the same into court that the same may be cancelled."

The answer of the defendants, Hapgood & Co., sets up the recovery by them of the three several judgments against the said C. Maxon Northrup in the probate court of Fillmore county. That the said court then and there had jurisdiction of the person of the said Northrup, and that said judgments were regularly rendered and entered. That on the 3d day of July, 1875, the said Hapgood & Co. caused transcripts of said judgments to be filed in the office of the clerk of the district court in and for said county, and to be duly entered upon the judgment record in and for said county, and the said Northrup was then the owner of said south-east quarter of the north-east quarter of section one, township eight north, of range four west, in said county, that said judgments became, and thereby were, liens upon the said lands. That on the first day of November, 1875, W. H. Blain, then probate or county judge of said county of Fillmore, tendered his resignation of said office to the county commissioners of said county, who duly accepted the same, whereby a vacancy in said office of probate or county judge occurred. That the said county commissioners to fill said vacancy then appointed the said C. M. Northrup probate or county judge, who immediately entered upon the duties of said office, and as such probate or county judge was the legal custodian of the record, docket, and papers of said office, and while the said C. M. North-

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rup was probate or county judge as aforesaid, and while he had the dockets of said court in his possession, as aforesaid, he, the said C. M. Northrup, wrote upon the docket where the judgments against him were rendered the following, to-wit: "This judgment is satisfied by note of Wells secured by mortgage on Mill'property at Fillmore, dated April 20, 1875, for amount of judgment given to" * * all of which was written by the said Northrup without the knowledge or consent of the said defendants Hapgood & Co., and without the knowledge or consent of any agent or attorney of the said Hapgood & Co., all of which was and is utterly false and untrue, and said Hapgood & Co. nor any one for them has ever receipted said docket, nor received payment therefor, either in money or notes of any description, and that the same are unsatisfied. The said answer further denies that the said * * * ever was, either on the 15th day of September, 1877, nor at any other time the attorney in fact of the said Hapgood & Co., nor their attorney of record, only for the express purpose of answering for them in certain suits pending in the said court wherein the said C. Maxon Northrup was plaintiff, and the said Hapgood & Co. and others were defendants, and said * * was their attorney for the purpose of defending said suits for said Hapgood & Co., and that said * * * as such attorney of record, had authority from the said Hapgood & Co. to receive from said C. M. Northrup or any one for him, cash payment of the said judgments in their favor and against the said C. M. Northrup, and no other authority whatever. That the said defendants deny that * * as their attorney of record and as their attorney in fact, did on the 15th day of September, 1877, by writing of that date under seal duly acknowledged, release the two said judgments in favor of Hapgood & Co. and against the said C. M. Northrup, and they say

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that any pretended release which the said * * * might have made as their attorney, either of record or in fact, was wholly unauthorized by the said defendants, and they totally disaffirm any such release and refuse to ratify the same. Said defendants deny that on or about the first day of September, 1875, or at any other time, the said C. M. Northrup endorsed in blank or in any other way, and transferred and delivered to the said defendants two promissory notes dated April 26, 1875, one due November 1, 1875, and one due January 1, 1876, each for the sum of two hundred and twenty dollars, with interest thereon at the rate of ten per cent per annum from the date thereof, and providing for attorneys' fees, and signed by George Wells, described in and the payment thereof secured by the mortgage, marked in plaintiff's petition "E," and said defendants deny that said notes were received by them on or about September 1, 1875, or at any other time on account of said judgments against C. M. Northrup and in their favor, and they deny that they or any one for them ever took, had, or received said notes for any purpose whatever, and said defendants deny that they ever agreed and contracted that when said notes should be paid that said defendants would fully release and satisfy said judgments, and they deny that they ever agreed or contracted that the payment of the said notes should be in full or in part satisfaction of the said judgments, and said defendants deny that said Jerusha A. Ellis or any other person whomsoever fully paid said notes or any part thereof to the said defendants, and said defendants say that said Jerusha A. Ellis nor any one for her ever paid them or any of their agents or attorneys any money whatever upon said judgments. The said defendants as a third defense further allege in their said answer, that at the time of the purchase of the real estate by the said Jerusha A. Ellis from the

Wells', it was mutually agreed by and between them that she, the said Jerusha A. Ellis, would and did assume to pay the said judgments of the said Hapgood & Co., which were then understood and admitted by all parties concerned to be liens upon said real estate, and that she has never paid them or any part thereof; and the defendants also set up in their said answer that the said mortgages from the Wells' to C. M. Northrup were foreclosed by action in the said court, that the said defendants with others were made defendants in said action as lien-holders against said premises, that the said Jerusha A. Ellis and James K. Ellis, subsequent purchasers thereof, were also made defendants in said action. That said Hapgood & Co. answered in said actions, setting up their said judgment lien and alleging that the same remained of force and wholly unsatisfied and unpaid. That said causes were referred to and tried by a referee, who found that there was then due to the said defendants, Hapgood & Co., on their said judgments the sum of \$569.16, and that the same was a first lien upon said premises. That the said finding of said referee was approved by the court and a decree entered accordingly.

It is to be regretted that the plaintiffs in error, having brought so voluminous a record to this court, should have omitted to also bring copies of the final decrees in said foreclosure suits, or at least one of them, yet the writer as an individual member of the court, thinks that any decree which the said court could have properly rendered in said causes must have contained authority to the said Hapgood & Co. to enforce the same by an order of sale in case of the failure to do so on the part of the plaintiff therein. And that in the absence of either suggestion or evidence to the contrary, this court must presume that such decrees do contain such authority.

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The plaintiffs interposed a general demurrer to the said answer of Hapgood & Co., which was by the court sustained, and a decree entered perpetually enjoining the said Hapgood & Co. from enforcing their lien, etc.

The allegations of the petition, so far as the lien of the plaintiffs in error is concerned, present five points. 1. They deny that plaintiffs in error obtained judgments against Northrup in the probate court. 2. They allege that such judgments were satisfied in the docket of the said probate court. 3. They deny that said judgments were ever entered on the judgment record of the district court so as to become liens upon the real estate in question. 4. They allege that such judgments were satisfied of record in the district court. 5. That C. M. Northrup delivered two of the notes executed to the Wells' to the plaintiffs in error, which they received with the agreement that when paid they should be in full for the said judgments, and that said notes have been paid to the plaintiffs in error; and I perhaps ought to notice as a 6th point the general assertion that Jerusha A. Ellis, one of the defendants in error, has paid the said notes, etc.

It is perhaps sufficient for the purposes of this case to say that each one of the above stated points of the petition is met by a specific denial in the answer.

The plaintiffs in error in their answer also set up in bar of the plaintiff's action, the former adjudication of the same questions in the two cases of Northrup v. Wells et al.

Without stopping to comment upon the curious anomaly presented by those cases, of a party suing his own creditors, further than to say that probably they alone could complain of such proceeding, as the counsel in their brief desire the opinion of the court as to the effect of the former adjudication, I will say that as

I understand it, under our law and system of pleading, where in a foreclosure case several parties are brought into court and declared against as subsequent incumbrancers, purchasers or lessees of the mortgaged premises, and called upon to set out their several and respective liens, claims, and rights therein, their respective answers may also be considered as cross-petitions for relief as against each other, as well as against the plaintiff. Any one of said defendants regularly served with process who fails to answer any material allegation contained in the answer of his co-defendant is bound thereby and by the decree founded thereon, and unless he appeals from such decree, the same becomes as to him, *res adjudicata*.

Under our system of practice, when a party brings a suit as plaintiff, or in a suit is served with process as a defendant, after answer day, at least, he must take notice of all pleadings filed in the case, either by his opponent or by his co-plaintiff or defendant, and ordinarily at least, pleadings are not required to be served or notice of their filing given.

If I am not wrong in the above views, then the field of inquiry in this case, from a very broad one, is brought to a rather narrow one. And the question is, whether the defendant in error, Jerusha A. Ellis, has paid to the plaintiffs in error the money found due them by the referee in the said causes, or one of them, as affirmed in and by the decree of the district court, and upon that point the pleadings on the part of the plaintiffs in error are not demurrable.

The decree of the district court sustaining the demurrer to the answer, as well as that perpetuating the injunction in said action, is reversed, and the cause remanded for further proceedings, according to law.

REVERSED AND REMANDED.

H. BIRDSALL, SON & CO., PLAINTIFFS IN ERROR, v. J. M.
CARTER, ET AL., DEFENDANTS IN ERROR.

1. **ERROR: ASSIGNMENT OF.** In a petition in error an assignment in these words, "That the said court erred in the instructions given to the jury in the trial of the said cause," is too indefinite to be considered, unless the entire charge be erroneous. And the same is true of like assignments as to the admission or rejection of evidence.
2. ———: **REFUSAL TO INSTRUCT.** It is not error to refuse an instruction as to a rule of damages rendered inapplicable by an erroneous exclusion of evidence.
3. ———: **FORM OF VERDICT.** Error does not lie upon the refusal of the court to give to the jury on their retirement forms of verdict, although suitable, requested by counsel.
4. ———: **OCCURRING ON TRIAL: REVIEW.** The rule of practice as to reviewing questions occurring during the trial of a cause by petition in error is, that it must have been first presented to the trial court by motion for a new trial.
5. **Warranty of Goods Sold: DAMAGES FOR BREACH OF, WHEN NOT RETURNED.** When goods are sold with warranty as to quality, and are found to be defective, if the purchaser retain them, the measure of his damage is, the difference between their value with the defect warranted against, and the value which they would have borne without that defect.

ERROR to the district court of Cass county. The action was founded on two promissory notes. Defense, that notes were given in consideration of a threshing machine which the plaintiffs sold and delivered to defendants, with certain warranties accompanying the sale, etc.; that the machine did not work as warranted, whereby defendants were damaged, etc. Trial below before POUND, J., and a jury, resulted in a verdict for defendants, and plaintiffs brought the case up upon a petition in error.

Wheeler & Stone, for plaintiffs in error.

11	143
15	406
11	143
33	591
11	142
84	115
11	143
40	24
40	188
11	143
43	734
11	143
44	632

T. M. Marquett and *George S. Smith*, for defendants in error.

LAKE, J.

The *first* error assigned goes to the instructions given to the jury. The assignment is in these words, viz.: "That the said court erred in the instructions given to the jury in the trial of the said cause." We have frequently held that assignments similar to this were too indefinite to be considered. And recently, in the case of *Tagg v. Miller*, 10 Neb., 442, it is said that "If the whole charge were bad, such general assignment would be sufficient; but not being so, the particular portions complained of should have been distinctly pointed out." That rule is applicable to this assignment.

The *second* error complained of is the refusal of the court "to give the instructions which the said H. Birdsall, Son & Co. prayed the said court to give." The instructions requested, and so refused, were two, one of which stated a rule for the estimation of damages in case the jury found a breach of warranty by the defendant, and the other the form of verdict for a finding in favor of each of the parties. The proposed rule of damages, abstractly considered, is not objectionable, but, by reason of the erroneous exclusion of certain testimony offered by the plaintiff, was rendered inapplicable. The instruction offered as to the form of verdict, although quite suitable to the issues upon which the jury were to pass, was not at all essential to the plaintiff's rights. Whether this information should be given was entirely discretionary with the trial judge. The verdict, if merely informal, could be corrected on the return of the jury into court with their findings.

The *third* point made by the petition in error, "That the said court erred in admitting the evidence of James

Birdsall v. Carter.

Gilmore, to which the plaintiff objected," while probably referring to an actual error in the admission of testimony, cannot be here considered, for the reason that it was not mentioned in the motion for a new trial. The rule of practice which we have uniformly applied in such cases is, that the particular error must have been presented to the trial court for correction before it can be made the subject of review. The *fourth* and *eighth* assignments of error, one relating to the admission of certain evidence against the plaintiff's objection, and the other to the rejection of a portion of that offered by him, must share the same fate, and for the same reason.

The fifth assignment is, "That the court erred in rejecting the evidence offered by the plaintiff." This is untrue in fact, for the record shows that nearly all the testimony offered by the plaintiff was admitted. But if the intention was to refer to some particular items ruled from the jury, then the assignment is bad for being indefinite. An assignment so general will not be considered unless all the evidence excluded ought to have been admitted, which is not the case here.

The *sixth* assignment is the only one that can be sustained. It is, "That the said court erred in rejecting the evidence of R. G. Doom." Under the rule just stated this one can be considered. The testimony thus referred to as having been excluded was to the effect, that by the outlay of a reasonable sum of money—about one hundred dollars—all the defects in the machine complained of could have been remedied. This testimony, in view of that already before the jury, was certainly proper. Here was a machine, of the estimated value, when sold to the defendants, of over seven hundred dollars. They used it, as they say, about six weeks, and then abandoned it to the action

of the weather on the farm of a Mr. Foltz, where what remained of it still was at the time of the trial.

When the defendants found that the machine did not answer the requirements of the warranty, two courses were open to them, either one of which they were at liberty to take. They could either return it and recover what had been paid of the consideration, or keep it and recover damages caused by the breach of the warranty. They seem to have chosen the latter course, whereby it became necessary on the trial to ascertain as nearly as possible what those damages were. The purchaser had a right to expect and to require the article to be in all respects what the contract called for, or in other words, such as it was guaranteed to be. They could neither exact a better, nor be compelled to accept a poorer. But having chosen to retain it, so that it has become wholly lost to the sellers, if it were in any essential particular defective when they received it, they were damaged in an amount equal to the difference between the value of the machine as it was and as it should have been. 2. Parsons on Contracts, 487.

In Woods' Mayne on Damages, section 224, the rule is stated thus: "When the article has not been returned, the measure of damages will be the difference between its value, with the defect warranted against, and the value which it would have borne without that defect."

It seems to us a very just proposition that, if the machine could have been made equal to the warranty by the expenditure of one hundred dollars, the defendants had no right to abandon it, declare it worthless, and throw the entire loss upon the plaintiffs. To do this would be the rankest injustice.

The *seventh* assignment, that the "court erred in rejecting the evidence of skilled mechanics," cannot be

sustained. It is indefinite, and besides the record fails to disclose that any such evidence was before the court.

The question as to whether the finding of the jury is supported by the evidence is alluded to by counsel in their briefs. This question, although made in the motion for a new trial, is not mentioned in the petition in error. Neither is the overruling of the motion for a new trial assigned for error. Therefore, we cannot enter upon an inquiry as to the sufficiency of the evidence to support the verdict.

For the error in excluding the proposed testimony of the witness Doom, the judgment is reversed, and a new trial awarded.

REVERSED AND REMANDED.

MILTON J. TOMPKINS, PLAINTIFF IN ERROR, v. JOHN
BATIE, DEFENDANT IN ERROR.

1. **Chattel Mortgage:** RELEASE OF, BY TENDER OF AMOUNT SECURED. A mere tender of the amount secured by a chattel mortgage to the creditor on the day fixed for payment, although not accepted, nor kept good, has the effect to release the property from the lien of the mortgage.
2. ———: TENDER AFTER DEFAULT. But if the tender be made after default of payment at the stipulated time, it must be kept good, or it will be entirely unavailing.
3. **Tender Must be Unconditional.** A tender of money in payment of a debt, to be available, must be without qualification, that is, there must not be anything raising the implication that the debtor intends to cut off, or bar a claim for any amount beyond the sum tendered.
4. ———: RULE APPLIED. In the case at bar, the evidence showed that the offer of payment was this: "I showed him \$500.00, and told him he could have it for his claim." *Held*, that this was a conditional offer, and unavailing as a tender.

11	147
20	96
21	899
22	215
24	634

11	147
39	631

11	147
40	896

11	147
146	899

11	147
48	807

11	147
57	599

ERROR to the district court of Dodge county. The case was replevin to recover possession of certain personal property which the defendant, Batie, had mortgaged to secure notes executed by him to Reynolds, who assigned same to First National Bank of Fremont, who assigned same to Tompkins. Batie's answer alleged, in substance, that plaintiff's only claim to the property arose from a pretended purchase of the chattel mortgage, whereby the property had been conveyed to one Wilson Reynolds; that the notes were usurious, and after they became due and while yet in possession of the property he, (Batie), tendered to Reynolds the sum of \$500—enough to satisfy his claim, with legal interest; that after the tender, Reynolds, the bank, and Tompkins, the plaintiff, conspired together, and had the notes and mortgage transferred from Reynolds to the bank and from the bank to Tompkins. The reply denied the conspiracy, denied the tender, and alleged that Tompkins purchased from the bank, who was a *bona fide* holder. Trial before Post, J., and a jury. Verdict for defendant, that right of property was in him; value, \$801.28; damages, five cents. Judgment thereon and for return of property, etc., from which plaintiff prosecutes this petition in error.

Marshall & Sterrett, for plaintiff in error, cited *Cheminant v. Thornton*, 2 Carr. & Payne, 50. *Mitchell v. King*, 6 Id., 237. *Sutton v. Hawkins*, 8 Id., 259. *Kortright v. Cady*, 21 N. Y., 367. *Miller v. Holden*, 18 Vt., 337. *Strong v. Harvey*, 3 Bing., 304. *Glascott v. Day*, 5 Esp., 48. *Wood v. Hitchcock*, 20 Wend., 47. *Potts v. Plaisted*, 30 Mich., 149. *Richardson v. Boston Chemical Laboratory*, 9 Met., 42. *Robinson v. Fitch*, 26 Ohio State, 659. 1 Parsons Notes and Bills, 218, 224. *Roxborough v. Messick*, 6 Ohio State, 448. *Crain v. McGoon*, 86 Ill., 433. *Caruthers v. Humphrey*, 12 Mich.,

Tompkins v. Batie.

270. *Adams v. Nebraska City National Bank*, 4 Neb., 370. *Brown v. Bement*, 8 Johns., 96. *Perre v. Castro*, 14 Cal., 519. *Maynard v. Hunt*, 5 Pick., 240. *Crosby v. Chase*, 17 Maine, 371. *Conner v. Carpenter*, 28 Vt., 237.

N. H. Bell, for defendant in error, cited *Kortright v. Cady*, 21 N. Y., 343. *Jackson v. Crafts*, 18 Johns., 110. *Edwards v. Farmers' Ins. and Loan Co.*, 21 Wend., 467. *Potts v. Plaisted*, 30 Mich., 149. *Moynahan v. Moore*, 9 Mich., 9. *Caruthers v. Humphrey*, 12 Mich., 270. *Van Husan v. Kanouse*, 13 Mich., 303. *Winchester v. Ball*, 54 Me., 558. *West v. Crary*, 47 N. Y., 423. 2 Jones on Mortgages, sec. 896. *Reed v. Marble*, 10 Paige Ch., 409. *Hetzell v. Barber*, 6 Hun., 534.

LAKE, J.

The principal question in this case was raised in the court below by an instruction to the jury, of which the following is a copy: "If you find from the evidence that illegal interest has been taken or contracted for, and that the bank was not the *bona fide* holder thereof" (the note and mortgage), "then, to make the tender sufficient in amount, it was enough for Batie to tender the sum received by him without any interest; and in order to discharge the lien of the mortgage, such tender, if refused, need not be kept good, or the money brought into court."

The act of tender here referred to took place long after the maturity of the note which the mortgage was given to secure, and the question is, whether the last proposition of this instruction states the law correctly. Counsel on each side of the question have argued it with consummate skill, and have fortified their respective positions with numerous authorities, so that we are relieved from the labor of extended research.

From the cases cited, it is certain that there is much conflict in the more recent decisions as to the effect of a tender upon a security, if made after what is termed the "law day" has passed, while probably there is none as to the fact that if made on that day it will release the property from the lien. At the common law, to have this effect, the tender must be made on the day the debt falls due, but need not be kept good.

The case of *Kortright v. Cady*, 21 N. Y., 343, is one on which great reliance is placed by defendant's counsel to sustain the charge of the court. This, however, appears to have been decided by a divided court, and Denio, J., while concurring in the result, did so, as he said, on the ground that the question was so far determined by previous decisions in that state, "that it would be indiscreet to examine it in the light of reason and the analogies of the law." But Welles, J., went further, and gave a very able dissenting opinion, wherein he reviewed the course of decisions by the courts of New York, and concluded that the better authority was that a mere tender of payment after the maturity of the debt would not release the lien of a mortgage given to secure it. However, the rule of the majority of the court in that case is now to be regarded as the settled law of New York, as it confessedly is of Michigan.

But in California, where the contrary rule prevails, it was said in one case that, "The debtor is as much in default for not paying when the debt is due, as the creditor is in default for not receiving the money afterward when offered. It would be very harsh to hold that the debt is lost—the general effect of loosing the security by a mere refusal, at a particular moment, to receive it—that refusal induced, too, as it might be, by a variety of circumstances morally excusing it, or at least, not grossly violative of any positive duty, and

productive of little or no injury to any one." *Perre v. Castro*, 14 Cal., 519. See also *Himmelmänn v. Fitzpatrick*, 50 Id., 650, and *Crain v. McGoon*, 86 Ill., 481. In the last named state it is held that a tender of the amount due after the time agreed upon, unless kept good, will not operate to release the lien of a mortgage given to secure it. And this, we think, is a wholesome rule. The foregoing, and most of the cases cited, relate to real estate mortgages, whereas the one now under consideration is a mortgage of chattels, which, in this state is, in its legal effect, strikingly analogous to a mortgage of real property under the common law. "According to the strict rule of the common law, a mortgagor who failed to perform the conditions contained in the mortgage would forfeit his right to the land, or to redeem it by *subsequently* tendering the amount due upon the mortgage." *Broom & Hadley's Com.*, Vol. 1, Am. Ed., 612, N. 288. In case of such forfeiture the mortgagor could obtain relief only in a court of equity, wherein the land mortgaged was treated as a mere pledge which the mortgagee held as security for the debt due to him.

In *Adams v. Nebraska City National Bank*, 4 Neb., 370, it was held, "That a chattel mortgage transfers to the mortgagee the whole legal title to the things mortgaged, subject only to be defeated by performance of the condition." And in *Tallon v. Ellison & Sons*, 3 Id., 63, it was said, "The legal title passes to the mortgagee, subject to the mortgagor's right to perform the condition, and after default the legal title is said to become absolute in the mortgagee." But the mortgagor has a right to redeem the mortgaged property, at any time before it is sold, by paying the mortgage debt.

Such being the character of the instrument, and the rights of the parties under it, there seems to be good

reason for adopting as our guide those adjudications which were made upon mortgages governed by the principles of the common law, rather than those in which the mortgage is regarded as a mere security for a debt, and the mortgagor regarded as the owner of the fee until his right of redemption is foreclosed. Accordingly, we feel constrained to hold, as was held in *Crain v. McGoon*, *supra*, that a tender after the law day must be kept good or it will be entirely unavailing as such.

There is another question really back of the one we have been considering, discussed by counsel, which must not be overlooked. It is whether what is relied on for that purpose is sufficient in law to constitute a tender. It was this as disclosed by the testimony of the defendant himself from which we quote as follows:

Q. You may state whether you ever made a tender to Mr. Reynolds of any sum of money on account of those notes?

A. Yes, sir.

Q. How much did you tender him?

A. \$500.00. That is, I showed him \$500.00.

Q. And told him he could have it for his claim?

A. Yes, sir, it was settled with me.

Q. Did he take it?

A. No, sir, he said he wouldn't take it.

Q. You may state whether you have always been ready and willing to pay him \$500.00 in settlement of the notes?

A. Yes, sir, up to the time he took my property.

There was some further examination which disclosed the fact that the reason of the refusal to take the sum offered was its alleged insufficiency to cover the amount claimed to be due.

A *tender* is defined to be the offer of a sum of money in satisfaction of a debt or claim by producing and

showing the amount to the creditor, or party claiming and expressing verbally a willingness to pay it. Worcester. The tender must be unconditional. Brown's Law Dictionary, 352. "Thus, although a party who tenders money has a right to exclude any presumption against himself, that the sum tendered is in part payment of the debt; yet, if he add a condition that the party who receives the money shall acknowledge that no money is due, this will invalidate the tender." Chitty on Contracts, 699, marginal. And in *Wood v. Hitchcock*, 20 Wend., 47, it was held that a tender of money in payment of a debt to be available must be without qualification, that is, there must not be anything raising the implication that the debtor intended to cut off or bar a claim for any amount beyond the sum tendered; and it was accordingly held that the tender of a sum in full discharge of all demands of the creditor was not good. In this case COWEN, J., said, "It was clearly a tender to be accepted as the whole balance due, which is holden bad by all the books." The reason of this rule is manifest, for if the tender be of a sum, as all that is due, that being disputed, and the creditor receives it, under these circumstances it might compromise his rights in seeking to recover more, whereas, if the same sum were tendered unconditionally no such effect could follow.

Such being the law, let us apply it to the testimony of the defendant, and how stands the alleged tender? He says: "*I showed him \$500 and told him he could have it for his claim.*" That is, if the plaintiff would surrender his entire demand, he would give him the \$500, otherwise not. This certainly was within the operation of the rule that a conditional offer of payment which the creditor cannot accept without barring all further claim is unavailing as a tender. Here was a dispute as to the amount actually due, and the offer was made

evidently with the view to an adjustment of the whole matter, and to cut off all further claim. And had the offer been accepted, such doubtless would have been the effect.

Such being our views, the judgment must be reversed and a new trial awarded.

REVERSED AND REMANDED.

COBB, J., dissents.

11	164
56	101

HIRAM L. WILCOX, APPELLANT, v. CHARLES B. BICKEL
ET AL., APPELLEES.

Corporation: RIGHTS OF STOCKHOLDER. A stockholder in a corporation has a remedy in chancery against the directors to prevent them from doing acts which would amount to a violation of the charter, or to prevent any misapplication of their capital or profits which might lessen the value of the shares, if the acts intended to be done amount to what is called in law a breach of trust or duty. So also a stockholder has a remedy against individuals, in whatever character they profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. *Dodge v. Woolsey*, 18 Howard, 831.

APPEAL from the sustaining of a demurrer to plaintiff's petition in the district court for Lancaster county, held by POUND, J. The petition states, among other things, the organization of the Nebraska Leather Company, plaintiff's possession and interest as stockholder therein, and conveyances to defendants of the real estate belonging to the corporation by the president, one Holcomb, and one Baldwin, claiming to act as secretary, without any authority of the stockholders or board of directors, without consideration, and for a fraudu-

Wilcox v. Bickel.

lent purpose of benefiting Holcomb and Baldwin, and that they had absconded, and prays to remove the clouds thereby cast upon the title, and to protect the property from the consequences of such conveyances.

W. J. Lamb, for appellant. A stockholder otherwise remediless can maintain this action. *Peabody v. Flint*, 6 Allen, 52. *March v. Eastern R. R.*, 43 N. H., 516. *Abbot v. Rubber Co.*, 33 Barb., 578. *Butts v. Woods*, 38 Barb., 181. The corporation having ceased to exist by its own acts was dissolved. *Carey v. C. & C. R. R. Co.*, 5 Ia., 358. *Bradt v. Benedict*, 17 N. Y., 93. *Canal Co. v. R. R. Co.*, 4 Gill. & J., 121.

Galey & Abbott and *W. H. Snelling*, for appellees. The plaintiff, as a stockholder, cannot bring this action alone. G. S., 529. G. S., 180. The corporation must be dissolved pursuant to statute. G. S., 200-201. *Field on Corp.*, 563. *Revere v. Boston Copper Co.*, 15 Pick., 351. Whether a corporation has violated its charter or forfeited its franchises is solely one of law, not equity. *Doyle v. Peerless*, 44 Barb., 239. *State v. Ins. Co.*, 8 Humph., 235. *State v. So. Pac. R. R. Co.*, 24 Tex., 80. Plaintiff cannot represent or deny the corporation.

COBB, J.

Under the state of facts set up in the petition, it cannot be doubted that the Nebraska Leather Company, were it in a condition to assert its rights, could maintain an action against the defendants Ely and Bickell, and to clear its real estate from the cloud cast upon its title by the conveyances described. The plaintiff shows himself to be the owner of the equal one-half of the capital stock of the said corporation, and accordingly deeply interested in the preservation of its property.

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Not only so; he shows that he is in the lawful possession of said real estate under and by authority derived from the said corporation, which possession the defendants Ely and Bickell, by means of the unauthorized and fraudulent acts of the said Holcomb and Baldwin, are about to disturb.

Were it not for the alleged disorganized condition of the said corporation, it would be necessary for the petition to state that the plaintiff had first applied to the officers or managing directors of the company and demanded that proper proceedings be taken in the name of the corporation for the protection of the property, but the allegations of the petition to the effect that all of the officers of the company have absconded and their whereabouts unknown, etc., constitute a sufficient showing that it was impossible for the plaintiff to make such demand.

In the case of *Dodge v. Woolsey*, 18 Howard, 831, the plaintiff was a stockholder in a bank incorporated and doing business in the state of Ohio. The defendant Dodge was about to collect by distress certain taxes, which were illegal, from the bank. The plaintiff requested the bank to take legal steps to prevent this, but it declined to do so. The supreme court held that he could maintain his suit against the collector for an injunction, making the bank also a party. In the opinion, the court say: "It is now no longer doubted, either in England or the United States, that courts of equity in both have a jurisdiction over corporations at the instance of one or more of their members, to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits which might result in lessening the dividends of stockholders or the value of their shares, as either may be protected

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by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into and to enjoin, as the case may require that to be done, any proceeding by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law."

Applying the above principles to the case at bar, it cannot be said that the petition fails to set out a cause of action against the demurring defendants. It therefore necessarily follows that the district court erred in sustaining the demurrer.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

JOSEPH E. COBBEY, PLAINTIFF IN ERROR, V. JAMES R. BURKS, DEFENDANT IN ERROR.

1. **Practice in Supreme Court: ASSIGNMENT OF ERROR.**

When on appeal from a judgment of a justice of the peace an appellee answer and go to trial in the district court, he cannot assign it as error that he was required by the court to do so before the time required by law.

2. **Taking Illegal Fees.** Mistake or ignorance without corrupt intent is no defense in an action on the statutory penalty for an officer taking greater fees than are allowed by law.

ERROR to the district court for Gage county. It was an action brought to recover the penalty imposed for taking of illegal fees by Gen. Stat., 385. Comp. Stat., 280.

11	157
28	558
11	157
37	158
11	157
46	314
11	157
52	809

Plaintiff had judgment, and Cobbey, defendant, then brought the cause up by petition in error.

Colby & Hazlett and Sabin & Smith for plaintiff in error. A party cannot by contract abridge or sign away his statutory rights. *Curtis v. O'Brien*, 20 Ia., 376. *Gittings v. Baker*, 2 Ohio St., 21. To incur the penalty imposed by statute, the act must be knowingly and corruptly done, whether the statute provides so or not. *Triplett v. Munter*, 50 Cal., 644. *Haynes v. Hall*, 27 Vt., 30. *Graham v. Kibble*, 9 Neb., 182. *Runnells v. Fletcher*, 15 Mass., 525. *Spence v. Thompson*, 11 Ala., 747. 2 Bish. Cr. L., sec. 396. *Dunlap v. Curtis*, 10 Mass., 210.

Bush & Richards and Ashby & Pemberton for defendant in error. Defendant waived his rights by going to trial. *Mulhollan v. Scoggins*, 8 Neb., 202., and if he did not, it was error without prejudice. Intention governs in cases *malum in se* only. *Coates v. Wallace*, 17 Sergt. & R., 75. 3 Greenl., Ev., sec. 21. 2 Whart., Ev., sec. 1243.

COBB, J.

The plaintiff in error makes five points against the judgment, which I will examine in their order.

"1. That the court erred in requiring the plaintiff in error—defendant in the lower court—to answer the plaintiff's petition in this action on the 25th of October, 1880, against the defendant's objection and protest, * * * the said case being an appeal case from a justice's court, and the said term of the district court being the first term of said district court after the rendition of the judgment in the justice's court, and the said defendant being entitled to have until the third Monday after the second day of the said

October term of said court in which to file his said answer."

"2. The court erred in overruling the motion of the defendant for leave to file his answer in said cause on or before the third Monday after the second day of the said October term of said court. * * *

"3. The court erred in finding for the plaintiff in the lower court—defendant in error—when it should have found for the defendant in the lower court—plaintiff in error—in that the evidence showed that the fees taken claimed to have been illegal were not taken intentionally by the defendant knowing them to be illegal, but were taken inadvertently and through mistake of fact by the defendant, under the belief that the defendant was entitled to them, and that the amount claimed to be an illegal excess was refunded before the suit was brought."

"4. That the court erred in finding and entering judgment for the plaintiff in the lower court—defendant in error—as there was no evidence to sustain the same. The evidence not showing that any illegal fees were taken."

"5. The court erred in finding and giving judgment for the plaintiff and against the defendant in the lower court, in that the evidence shows that the fees taken by the defendant, and claimed to be illegal, and in excess of those allowed by the statute, were less than provided for by statute. The transcript charged for by defendant contained 2263 words, for which defendant was entitled to receive \$2.26, and for the certificate and seal thereto, twenty-five cents, and for the entering and filing thereof on the record, ten cents, making \$2.61, while only \$2.50 was received therefor, and seventy-five cents thereof was refunded before suit was brought."

As to the first and second points, had the plaintiff

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in error stood upon his rights as he seems now to understand them, and refused to answer or go to trial, except within the rule day as provided by law, it would probably have been error on the part of the district court to have defaulted him before that time, notwithstanding his stipulation entered into in the justice's court. But he did not choose to stand upon his rights in that respect, for it appears by the record that on the 25th day of October, 1880, he filed his answer in the said cause, waived a jury, and proceeded to trial to the court. It is true that it appears from the bill of exceptions that on the 23d day of said October, the court made an order requiring plaintiff in error to answer on or before the 25th of said month, and denied his application for leave to answer on or before the third Monday after the second day of said term. If this was error on the part of the district court, the plaintiff in error had the way open to him, to either stand upon his rights, and upon a judgment being rendered against him on his failure to comply with such assumed erroneous order, or to waive such error by a compliance with its terms. I do not think that he could take the chance of going to trial at that term and still preserve the error, if error it was, for the purpose of obtaining a new trial in case of his defeat. Certainly not, when it appears from the whole case as it does here that the defendant was as well prepared for trial at that time as he ever could be.

The third point presents the question, whether the good faith of the defendant in demanding and receiving fees in excess of those allowed by law for the services rendered constitutes a defense to the action. Having examined the numerous cases cited to this point, I find but little ground for varying the plain and obvious language of the section of the statute, which provides that, "If any officer whatever, whose fees are

hereinbefore expressed and limited, shall take greater fees than are so hereinbefore limited and expressed, for any service to be done by him in his office, * * * such officer shall forfeit and pay to the party injured fifty dollars, to be recovered as debts of the same amount are recovered by law." In some of the states, to whose cases we are cited, the language of the statute is materially different from that above quoted. That of Massachusetts is, "that if any person shall wilfully and corruptly demand and receive any greater fee or fees," etc. While in an action under such statute it is obvious that proof of good faith on the part of the defendant would constitute a defense to the action, yet, it is equally clear that a decision thereunder furnishes no key to a proper construction of our own statute. In criminal prosecutions for extortion at common law the *malu fides* of the act is the very essence of the offense; yet cases of that kind furnish no authority applicable to a suit for the penalty imposed by our statute. Of such character are the citations to Bishop's Criminal Law, etc.

The provisions of the statute of Pennsylvania were similar to those of our own. Under it, in a case exactly in point, the supreme court of that state used the following language: "The penalty imposed by this act may be incurred by exacting fees, which are supposed at the time to be legally demandable. By the very words of the prohibitory clause the *taking* is the gist of the offence. Ignorance of the law will not excuse in any case; and this principle is applicable, and with irresistible force, to the case of an officer selected for his capacity, and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient share of intelligence to enable the party to follow a guide provided for him, with an unusual attention, clearness, and precision. On

any other principle a conviction would seldom take place even in cases of the most flagrant abuse; for pretexts would never be wanting. Sound policy, therefore, requires that the officer should be held to act at his peril; and we are of the opinion that the absence of a corrupt motive, or the existence of an agreement by the party injured, furnishes no justification for doing what the law forbids." *Coates v. Wallace*, 17 Sergt. & Rawle, 75.

I think the rule is correctly laid down by Greenleaf in the following language: "But where the statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact, or state of things contemplated by the statute, it seems will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship, having smuggled goods on board, and such goods are secreted (on board) by some of the crew, the owner and officers being alike innocent by ignorance of the fact, yet the forfeiture is incurred notwithstanding their ignorance. Such is the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts, and to obey the law at his peril." 8d Greenleaf on Evidence, section 21.

Upon the 4th and fifth points, having examined the evidence and inspected the certified copy of the record for which the alleged excessive fees were taken, I cannot say that there was error in the finding or judgment. The witness, Pettinger, called by the defendant, testified that there were one thousand eight hundred and sixty-eight words in the transcript. This at ten cents per hundred words would amount to one dollar and

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eighty-seven cents. Add twenty-five cents for the certificate and seal, and it amounts to two dollars and twelve cents. My own estimate from an inspection would make it some fourteen cents less, but in either case I fail to find sufficient ground for an impeachment of the finding.

There was some evidence of an attempt on the part of the defendant to refund the excessive fees, but such evidence must have been deemed insufficient by the trial court, in which view I think it is justified.

The above considerations lead me to the conclusion that the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. WILLIAM ODIER, v.
A. J. WEAVER.

Practice: BILL OF EXCEPTIONS. At the September term, 1880, of the district court for Richardson county, and on the 18th day of September, the case of Hosford & Gagnon v. William Odier, was given to the jury under exceptions on the part of the defendant, to the admission of certain testimony, as well as to the giving and denying certain instructions. The verdict and judgment were for the plaintiff. Upon application, the court granted defendant forty days from that day in which to prepare his bill of exceptions. On said day court adjourned to December 8th, of said year, on which last named day court met pursuant to adjournment, remained in session daily until the 10th, when it adjourned *sine die*. On the 22d of December the bill of exceptions was presented to the judge, who refused to sign the same, solely on the ground that the same was not presented in time. Upon application for mandamus to the judge requiring him to sign the said bill and demurrer to the said relation, *Held*, that a peremptory mandamus must be awarded.

ORIGINAL application for mandamus.

George P. Uhl, for relator.

No appearance for respondent.

COBB, J.

It appears from the relation in this case that at the September, 1880, term of the district court, in and for Richardson county, there was pending an action in which the relator was defendant, which said cause was tried to a jury; that upon said trial several exceptions were taken by said defendant, relator in this action, to the ruling of the court on many points relating to the admission of testimony, the giving and denying of instructions to the jury, and the overruling of a motion for a new trial; that the jury in said cause having brought in a verdict against the said defendant, relator herein, and he having filed a motion for a new trial, the same was overruled and final judgment entered in the said cause on the 18th day of September, 1880, whereupon the said defendant, relator herein, applied for an extension of time under the statute, in which to prepare and present to the judge of said court a bill of exceptions in said cause, and thereupon the court granted forty days accordingly.

It further appears that on said 18th day of September the said September term of said court was adjourned to the 6th day of December following, upon which last named day the court resumed its session in and for said county as of the said September term, and finally adjourned the said regular term on the 10th day of said month. And it further appears that on the 22d day of said month of December, the said defendant, relator, presented a bill of exceptions in said cause to the defendant, the presiding judge of said district court, and the judge who tried the cause, who refused to sign

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it solely on the ground that it was not presented within the forty days from the 18th day of September, the date of the order granting the extension of time, and the day of the adjournment over.

The law, as it formerly stood, provided that, "The party objecting to the decision must except at the time the decision is made, and time may be given to reduce the exception to writing but not beyond the term." Gen. Stat., 577. Thus the law stood when the case of *Mewis v. Johnson Harvester Company* was decided by this court. 5 Neb., 217. In which case it was held that, "In vacation a judge has no authority to allow a bill of exceptions; and if the record disclose that it was so allowed it will not be considered."

By this decision the defect in the law was sharply presented to the bar and the legislature, and at the next session of the latter body the law was amended as it now stands. Obviously the intent of the legislature was to enlarge and not to restrict the time in which a party could prepare and present his bill of exceptions for allowance. By the old law the losing party was allowed the whole of the term in which to prepare and present his bill of exceptions. The amended law reads as follows: "The party excepting must reduce his exceptions to writing within fifteen days, or in such time as the court may direct, not exceeding forty days from the rising of the court," etc. Laws 1877, 11. This language, "the rising of the court," must be deemed to be equivalent to final adjournment or "the last day of the term." *Mechanics Bank of Alexandria v. Withers*, 6 Wheat., 106. I think that it was the intention of the legislature to give the losing party some time after the close of the term, and the completion of the active duties of judge and attorneys in court for that term, in which to reduce his objections to writing, etc. Fifteen days was deemed

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sufficient time for such purpose in ordinary cases. But to meet cases of extraordinary magnitude or intricacy, and cases where the same attorney might have an unusual number of cases to prepare at the same time, the court was given a discretion to enlarge the time not to exceed forty days.

It is not necessary to examine the question whether the order of the court in this case extending the time for preparing and presenting the bill of exceptions could be so construed, taken in connection with the provisions of the statute, as to make the forty days time commence to run from the day of final adjournment, December 10th, or not; but certain it is that such order cannot be so construed as to cut off any portion of the fifteen days from that day given by statute.

As it appears by the relation, which stands admitted by the demurrer, that the bill of exceptions was presented less than fifteen days from the rising of the court, the writ must be allowed.

Since the above opinion was written the court has been officially advised that the respondent has, since the submission of the cause, signed the said bill of exceptions, consequently no writ will go out.

JUDGMENT ACCORDINGLY.

E. MARY GREGORY, PLAINTIFF IN ERROR, v. ANDREW C. LANGDON, DEFENDANT IN ERROR.

Evidence: OBJECTIONS TO DEED. On the trial L. offered in evidence a deed executed by the N. S. Company to G. B. H., which was objected to by G. as "irrelevant, immaterial, and incompetent." *Held*, That such objection was too general to reach defects in the form, execution, or acknowledgment of such deed.

11	166
13	20
11	166
35	591
11	166
37	354
11	166
46	912
11	166
55	454
11	166
168	790
11	166
159	99
11	166
60	177
11	166
61	699

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ACTION *quia timet* brought by defendant in error in the district court of Seward county. Trial there before Post, J., resulted in favor of plaintiff, and defendant Gregory brought cause here on a petition in error.

John S. Gregory, for plaintiff in error.

Norval Brothers, L. C. Burr, and J. R. Webster, for defendant in error.

COBB, J.

The plaintiff in error makes four points in her petition in error, as follows:

1. The judgment is contrary to law.
2. The court found for plaintiff when it ought to have found for the defendant Gregory, according to the law and the facts in the case.
3. The court erred in admitting the evidence objected to in said trial by the said defendant.
4. The finding of the court is contrary to equity and the weight of evidence in the case.

I will consider the third point first, as the other three may be considered together.

The plaintiff, in his petition, first sets up ownership of the lands in question by virtue of a deed of conveyance from Milton Langdon and wife to himself, and tracing back the title by virtue of several deeds of conveyance through George B. Hardenbergh, the Nebraska Salt Company, H. Willett Linderman, and Henry Tinnell to the United States. He then also sets up title to the said lands by virtue of ten years adverse possession.

Upon the trial the plaintiff offered the record of a deed from the Nebraska Salt Co. to George B. Har-

denbergh, to the introduction of which the defendant, plaintiff in error, objected, as immaterial, irrelevant, and incompetent, which objection was overruled and the record admitted.

The deed was not immaterial or irrelevant, as the evidence of such conveyance was absolutely necessary to complete the chain of title set up by the plaintiff in his petition, and a deed of conveyance from the Nebraska Salt Company certainly was competent so far as it went to establish the said chain of title. But it appears now from the brief of the plaintiff in error, her objection to said deed was to its form, the manner of its execution and acknowledgment, etc. The objection made at the trial as shown by the bill of exceptions was too general. The attention of the trial court should have been specifically directed to these points, otherwise this court would not be warranted in reversing a judgment on their account, however much we might be inclined to agree with the plaintiff in error in her views upon these defects in the deed, now that they are pointed out to us.

But were we at liberty to consider the defects in form, execution, and acknowledgment of the deed, and were we to find such defects fatal to its admissibility as evidence, even then the error complained of would, as we shall see, have been error without prejudice. The plaintiff, in his petition, claimed upon two titles, and if he can establish either one of them it will be sufficient. *Enders v. Sternbergh*, 2 Abb. Ct. App., Dec. 31. But I will examine the other three points, which may be considered together.

As before stated, the plaintiff sets up two titles to the premises. 1st, a paper title running back to the United States. By stipulation the plaintiff in error admitted every link in this chain except the one evidenced by the deed from the Nebraska Salt Company

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to George B. Hardenbergh. The evidence necessary to supply that link was offered and admitted over her objection to its relevancy, materiality, and competency; neither of which objections as we have seen were well taken, so that plaintiff's paper title was established.

But had the plaintiff failed to establish his paper title, his title by adverse possession was fully proved. Hardenbergh did not hold *under* the Nebraska Salt Company. He took possession by virtue of his *alleged* deed from the company, but he held in his own right, and his possession of these premises was sufficient in every quality to entitle him to the judgment which he did receive in the court below.

It is therefore unnecessary to examine the title set up by the plaintiff in error, for whatever might be her rights as against the Nebraska Salt Company, and however regular her proceedings for their enforcement, they could avail her nothing in this case.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF
IN ERROR, v. JAMES BONNER, DEFENDANT IN ERROR.

Practice: PARTIES. J. B. took out a policy of insurance on his own life, payable to his wife, for the benefit of her and their children. After paying the annual premiums on said policy for many years, all of which were paid by him out of his own money, and the policy always kept by him in his own possession, and under his control, it was allowed to lapse. Shortly afterwards, one C., a sub-agent of the company, bought in the said policy on the part of the company, from J. B., agreeing to pay \$350 as the surrender value thereof in premiums on a new

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policy which was issued to him, and one annual premium, \$118.64, credited thereon. When the second annual premium became due the company demanded payment thereof from J. B., whereupon he brought suit in his own name against the company for the said surrender value of the old policy, less the sum of \$118.64 allowed in premium on the new policy. On demurrer and on exceptions to the charge to the jury, *Held*, That such action was properly brought under sec. 32 of the code of civil procedure.

ERROR to the district court of Douglas county. Tried below before SAVAGE, J.

Albert Swartzlander, for plaintiff in error. The suit should have been brought in the name of Rebecca O. Bonner, the beneficiary. *Swan v. Snow*, 11 Allen, 224.

Webster & Gaylord, for defendant in error. James Bonner was the real party in interest. The wife had no vested interest in the policy. *Lemon v. Phoenix L. Ins. Co.*, 38 Conn., 294.

COBB, J.

The plaintiff took out a policy of insurance from the defendant on his own life, payable to his wife and their children, on which policy he paid the annual premiums for many years, but finally allowed it to lapse. Shortly afterwards one J. B. Cary, an acting agent of the defendant, applied to the plaintiff and proposed to purchase in the said lapsed policy on behalf of the defendant; and, finally, after considerable negotiation, it was agreed between them that \$350 should be the surrender value of the old policy; that plaintiff would surrender it to the company, and receive a new policy, running for ten years. The annual premiums on this new policy would amount to \$118.64, so that the \$350 agreed upon as the surrender value of the old policy would a little more than pay the said premiums for

three years. The new policy was delivered by the said Cary, and the old one taken up by him, and in making the change he presented several papers to the plaintiff for his signature and endorsement, all of which he signed or endorsed as requested. At the expiration of the year the defendant company demanded payment of the second annual premium of the plaintiff, when it appeared that among the papers which the plaintiff had endorsed at the request of the said Cary was a draft for \$180.24, which, together with the amount of the first annual premium on the new policy and the amount of a premium note, which appears to have been outstanding on the old policy, made up the sum of \$350, the agreed surrender value of the old policy. This suit was brought by the plaintiff, defendant in error, against the defendant, plaintiff in error, for the balance of said surrender value of the old policy, after deducting the amount of the first annual premium on the new policy. The verdict was for \$228.71, upon which the plaintiff entered a remittitur for \$3.00, leaving \$235.71 to stand as the judgment. In arriving at the amount found by the jury, they obviously allowed to the defendant company the amount of the said premium note outstanding on the old policy.

The first point made by the plaintiff in error, other than the general one that the court erred in overruling the motion for a new trial, arises upon the overruling of the demurrer to the reply, as well as upon certain instructions to the jury, and certain instructions prayed by the plaintiff in error, and refused by the court. The instruction prayed by the plaintiff in error and refused by the court presents the point, and is as follows: "If the jury find from the evidence that in the policy of insurance described in the pleadings the premiums were contracted to be paid by Rebecca O. Bonner, and in the case of the death of James Bonner, the insurance

money was to be paid to her, and that she is still living, then she is the beneficiary and the real party in interest, and any action founded on said policy to recover its surrender value must be brought in her name, and not in the name of the plaintiff."

The testimony was that the defendant in error had paid all the premiums on the old policy out of his own money; that he had always had the policy in his exclusive possession; that all of the negotiations for the taking up of the same and paying the surrender value thereof, by the company or its agent, had been made with James Bonner, and that his wife, Rebecca O. Bonner, knew nothing about it. It is true, that there is no direct testimony that the contract as evidenced by the old policy was (on the one part) made by the defendant in error, James Bonner, but I think myself warranted in assuming from his testimony, which I quote, that such was the case.

Q. Who paid the premiums on this old policy?

A. I did always.

Q. Whose money was it you paid on that policy?

A. My individual money.

Q. In whose possession was that policy, and under whose control was it?

A. Mine always.

Q. Had it been in the possession and under the control of anybody else?

A. No, sir.

Q. It was under your control all the while?

A. Yes, sir.

Section 32 of the code provides that " * * * a person with whom * * * a contract is made for the benefit of another, * * * may bring an action without joining with him the person for whose benefit it is prosecuted." Gen. Stat., 528.

If I am not wrong in assuming that the contract was

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made by James Bonner—in other words, that the old policy was taken out by him for the benefit of his wife and their children—then under the above provision of the code, there was no error on the part of the district court in overruling the demurrer, or in the charge complained of, or in refusing the prayer of the plaintiff in error. Pomeroy on Remedies and Remedial Rights, sec. 175, and authorities there cited.

There were other points made in the motion for a new trial and petition in error; but they are not insisted upon in the brief, nor do I think that, were they urged, they could be made controlling ones of the case.

The judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. CLARENCE A. NEWMAN, V. JOHN STAUFFER.

11	173
11	173
11	173
55	602

Clerk District Court. The act approved March 1st, 1879, authorizing an election of clerks of district courts in the year 1879, and every four years thereafter, in counties containing not less than eight thousand inhabitants, does not authorize an election of such clerks in other counties during the intervening years upon attaining that population.

ORIGINAL action in *quo warranto*.

Marquett, Deweese & Hall with *Whitmoyer, Gerrard & Post*, for relator.

No appearance for respondent.

MAXWELL, CH. J.

This is a proceeding by *quo warranto* to oust the defendant from the office of clerk of the district court of

Platte county, and to instate the relator therein. It is alleged in the petition in substance, that the relator, at the date of the general election in November, 1880, possessed and now has the necessary qualifications to entitle him to hold the office of clerk of said court; that at the election aforesaid he received for said office of clerk of the district court of said county ten hundred and thirty-six votes, and that one Jacob Gross received for said office six hundred and forty-one votes, the same being all the votes cast for said office at said election; that by the United States census taken in Platte county in June, 1880, said county contained nine thousand four hundred and fifty-seven inhabitants. The defendant, county clerk of Platte county, demurred to the petition, upon the ground that the facts stated therein were not sufficient to entitle the relator to the relief prayed for. The question to be determined is the validity of the relator's election to the office in question. This depends upon the construction to be given to that part of sec. 7, of an act "To provide a general election law, the procedure relative to contested elections, and the filling of vacancies in office," approved March 1st, 1879, that relates to clerks of district courts, which reads as follows: "In each county having a population of 8,000 inhabitants or more, there shall be elected in the year 1879, and every four years thereafter, a clerk of the district court in and for said county, and in each county having a population of less than eight thousand inhabitants, the county clerk shall be ex officio clerk of the district court, and perform all duties devolving upon that officer by law." It will be seen that it was only in counties having at least eight thousand inhabitants in the year 1879 that an election for clerk of district court was to be held in that year. There was no authority to call an election for that purpose in counties having less than eight

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thousand inhabitants, nor was it intended that counties whose population reached eight thousand between the years 1879 and 1888 should be entitled upon attaining that number to elect a clerk of the district court in the intervening years. The election was to be held in 1879 and every four years thereafter. There is no provision for an election in intervening years, and as there is no allegation in the petition that Platte county contained 8,000 inhabitants at the time of the election in 1879, the petition fails to state a cause of action. The election of the relator in 1880, being held without authority of law, is null and void. The demurrer is therefore sustained and the action dismissed.

ACTION DISMISSED.

11	175
56	692

THE STATE OF NEBRASKA, EX REL. REUBEN W. GRAY-
BILL, V. WALTER L. WHITTEMORE.

Mandamus: ELECTION LAW. A mandamus will not be granted to compel a county clerk to issue a certificate of election to a person who receives the highest number of votes for an office, where the election to fill said office was held without authority of law.

ORIGINAL application for mandamus.

Marquett, Deweese & Hall, for relator. No brief on file.

Agee & Hellings and *E. J. Hainer*, for respondent, contended, 1st, Mandamus not the proper action to try the right to the office; and, 2d, the statutes (Laws 1879, p 241) did not authorize an election in 1880.

MAXWELL, CH. J.

This is an application for a writ of mandamus to compel the defendant, who is county clerk of Hamilton county, to issue to the relator a certificate of his election to the office of clerk of the district court of that county. The petition states in substance that in the year 1880, Hamilton county contained eight thousand two hundred and seventy-seven inhabitants; that at the election held in that county in November of that year, the relator was a candidate for the office of clerk of the district court of that county, and received a majority of all the votes cast for said office at said election, and was afterwards by the board of canvassers declared duly elected to said office; that on the fourth day of December, 1880, he demanded of said defendant his certificate of election, which the defendant refused to issue.

The question to be determined has just been decided by this court in the case of *The State v. Stauffer*, ante p. 173. In that case it was held that as the statute required an election to be held for the office of clerk of the district court in counties containing not less than eight thousand inhabitants in the year 1879, and every four years thereafter, that it was not intended to apply to counties which attained the requisite number in the intervening years. The statute in effect classifies the counties in 1879 and every four years thereafter, and provides that counties containing not less than a certain number of inhabitants at the times designated, shall be entitled to elect a clerk of the district court. The classification is to be made in certain designated years, and can only be made at the time provided by law.

It is not contended that Hamilton county contained eight thousand inhabitants in the year 1879, nor was any clerk of the district court elected in that county in

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that year. There was therefore no vacancy in the office and the county clerk was ex officio clerk of the district court, and the so-called election of the relator was a mere nullity. Such being the case it was no part of the duties of the office of county clerk to issue a certificate of election to the relator. The writ is therefore denied and the proceedings dismissed.

WRIT DENIED.

THE B. & M. R. R. Co. IN NEBRASKA, PLAINTIFF IN
ERROR, V. SAMUEL B. ROSE, DEFENDANT IN ERROR.

1. **Railroad Company: REGULATION CONCERNING THE CARRYING OF PASSENGERS ON FREIGHT TRAINS.** A railroad company has the power to make, and in a reasonable manner to enforce, a rule or regulation to carry passengers on its freight trains, either not at all, or only upon the condition that they provide themselves with tickets.
2. **Enforcement of such Regulation: NOTICE.** In the enforcement of such regulation previous notice thereof must be given. It is not, however, required of a railroad company to bring home to a passenger actual notice of the regulation before the train leaves the station where he entered the car, to justify his expulsion therefrom, for want of a ticket, at any other than a regular stopping place. All that is required is, that a suitable general notice to the public be given for such length of time before the regulation is put into operation, as to make it reasonably certain that all passengers in the exercise of due diligence must become aware of its existence. And the right of expulsion for non-compliance with such regulation by a passenger may be exercised after leaving the station, at any suitable place, under all the circumstances of the particular case.

ERROR to the district court of Otoe county. It was an action brought by Rose for the recovery of damages alleged to have been sustained by him in consequence of his removal from a train of the B. & M. R. R. Co.

The plaintiff in his petition alleged that the weather was exceedingly warm at the time, and that he was ill, which fact was known to the conductor, and that he was willing and offered to pay a reasonable compensation to the conductor in charge of the train, and that the conductor removed him and he was compelled to walk to Waverly, the nearest station to where he was removed, and that his illness was increased and aggravated thereby, and that he was damaged, etc. The answer of the company in its first count contained a general denial, and in its second count set up a regulation that passengers would not be carried on freight trains unless they were provided with tickets, and also alleged that such regulation was known to the plaintiff, Rose. The answer further alleged, that "by a further rule or regulation of said defendants, the conductors of all freight trains were required to eject from their cabooses, cars, and trains, all *passengers* who had not provided themselves with tickets or the proper vouchers."

To this answer Rose filed a reply, denying each and every allegation contained therein, and also alleged that the company was accustomed to carry passengers by its freight trains, and did so regularly, and provided its freight trains with cars for carrying passengers thereon. And that the railroad company was carrying passengers on the train from which he was removed, and that there were passengers on said train traveling thereon, and that said train was engaged in carrying passengers. Trial before POUND, J., and a jury resulted in a verdict and judgment against the company for \$500.00, from which they prosecuted this petition in error.

T. M. Marquett, for plaintiff in error, cited on question of carrying passengers on freight train: *Arnold v. I. C. R.*

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R., 83 Ill., 273. *Eaton v. D. L. & W. R. R. Co.*, 57 N. Y., 382. *Creed v. Penn'a R. R. Co.*, 86 Pa. St., 146. Ill. Cent. R. R. v. *Johnson*, 67 Ill., 312. *O. & M. R. Co. v. Swarthout*, 67 Ind., 567. *Wilton v. U. R. R. Co.*, 107 Mass., 108. *Dunn v. Grand Trunk R. R.*, 58 Me., 187. Hutchinson on Carriers, 447. As to notice: *C. & A. R. R. v. Randolph*, 58 Ill., 510. *Eaton v. R. R. Co.*, 57 N. Y., 382. *Dietrich v. P. R. R. Co.*, 71 Pa. St., 432. *O. & M. R. Co. v. Applewhite*, 52 Ind., 540. *Johnson v. Concord R. Co.*, 46 N. H., 213. *State v. Overton*, 24 N. J. L., 435. *State v. Gould*, 53 Me., 279. *T. P. & W. R. Co. v. Patterson*, 63 Ill., 304. *Law v. Ills. Cent. R. R.*, 32 Iowa, 536. Also: Shearman & Redf. on Neg., 292. *U. P. R. R. Co. v. Nickols*, 8 Kan., 518. *C. C. & C. R. Co. v. Bartram*, 11 Ohio St., 457.

Ransom & Covell, for defendant in error, cited Constitution, sec. 4, Art. II. *C. & A. R. R. v. Flagg*, 43 Ill., 364. Hutchinson on Carriers, 570. *C. & C. R. R. Co. v. Bartram*, 11 Ohio St., 457. *Ills. & C. R. R. Co. v. Sutton*, 53 Ill., 397. *K. P. R. R. Co. v. Kessler*, 18 Kans., 523. Gen. Stats., 195, 203, 198. Shearman & Redf. on Neg., 304. *McDonald v. C. & N. W. R. R. Co.*, 26 Ia., 124. *Maroney v. Old C. & N. R. R. Co.*, 106 Mass., 153. Gen. Stat., 195, sec. 109.

LAKE, J.

The only questions to be considered in this case were raised by certain of the instructions given to the jury.

It appears on the twenty-first day of July, 1879, the defendant in error (plaintiff below), desiring to go from Waverly, in Lancaster county, to Lincoln, went upon one of the freight trains of the plaintiff in error, provided with what is called a caboose car, for that purpose, from which he was ejected by the conductor

of the train, a short distance out of Waverly, for the reason that he had not provided himself with a ticket, as a rule or regulation of the company then in force required, and after he had tendered to the conductor the customary fare in money.

One of the instructions to which exception was taken in the court below, and which fairly presents the principal point of difference, was in these words, viz.:

"The rule or regulation claimed by the defendant to have been adopted by it, that passengers would not be carried on freight trains unless they first provided themselves with tickets, will not justify defendant in having removed plaintiff from, or compelled him to leave, the freight train at a point on defendant's road not a regular station or stopping place, because plaintiff had not complied with such rule or regulation, unless plaintiff knew of such rule or regulation before he entered upon the train, or was informed that the defendant had such a rule or regulation before the train left the station where he took passage, provided plaintiff was willing and offered to pay for his passage."

It is clear, from the evidence, that the rule of the company here referred to was duly issued and published on or about the first day of June, 1879, and that copies thereof, in imposing form, were posted in all of the company's passenger stations, and in the cabooses employed on the road. The testimony of the station agent at Waverly, which was not contradicted, is to the effect that for more than a month before the day of the occurrence complained of, two of these notices had remained posted in the most conspicuous places in the waiting room at that station, and were still there on that day. It is clear, also, that the defendant in error had no actual knowledge of this regulation until informed by the conductor after the train had started, and just before he was put off. That he offered to pay

for his passage in money to the conductor, is also conceded.

We believe the authorities are generally in accord as to the right of a railroad company to make, and, in a proper manner to enforce, a rule or regulation to carry passengers on its freight trains, either not at all, or only upon the condition that they are provided with tickets, and prohibiting the collection of fare by conductors of such trains. *Chicago & Alton R. R. Co. v. Flagg*, 43 Ill., 364. *Arnold v. I. C. R. R. Co.*, 83 Id., 273. *Eaton v. Railroad Co.*, 15 Am. Repts., 513. *The C. C. & C. R. Co. v. Bartram*, 11 Ohio St., 457. *Law v. Ill. Cent. R. Co.*, 32 Iowa, 534. The point on which they are not harmonious is as to the manner of its enforcement, some courts holding, as was held by the court below in the instruction quoted, that actual notice of the rule must be brought home to the passenger before the train leaves the station in order to justify his expulsion therefrom for want of a ticket at any other than a regular stopping place. *Ill. Cent. R. R. Co. v. Sutton*, 53 Ill., 397. While others, with better reason, we think, only require a suitable general notice to the public for such length of time before the rule is to be put in operation as to make it reasonably certain that all passengers in the exercise of due diligence must become aware of it; and that the right of expulsion for non-compliance with the requirement may be exercised in any suitable place, under all the circumstances of the particular case. *C. C. & C. R. R. Co. v. Bartram*, 11 Ohio St., 457. *Law v. Ill. Cent. R. R. Co.*, 32 Ia., 534.

As to the notice here given of the regulation, we are of opinion that it was reasonable and all that should be required of the company in this particular to put passengers seeking conveyance on a freight train on their guard. With reasonable diligence on his part,

we think the defendant in error would have become informed of the necessity of providing himself with a ticket before entering the car. He knew that the train on which he purposed to go was not intended for passengers generally, but mainly devoted to the transportation of freight, and that the caboose which he entered was not fitted up for the accommodation of the traveling public generally. When he applied to the agent of the company to check his baggage, he was told that no checks were given for that train, and that if his baggage was sent it must go as freight, and be paid for as such. He accordingly had it billed as freight and forwarded. It would seem that after all this that common prudence would have led him to inquire whether he himself could go on the train as a passenger, and, if so, what his duties were in that regard. But, however that may be, we are of opinion that his alleged ignorance of the rule requiring him to provide himself with a ticket, which had been so long and conspicuously published, cannot avail him, and that the jury should have been so told, as was requested by one of the instructions tendered by the attorney for the company, but refused by the court.

This, together with a single other exception, to which we will hereafter advert, is all that we discover objectionable in the charge given to the jury. The only fault we find with the instruction quoted, and with others of like import, lies in their being conformed to the supposed duty on the part of the company, to give actual notice of the regulation to each individual passenger before it could be enforced against him. Holding, as we do, that the published notice was sufficient to put the passenger on his guard, and that he was bound by it, it follows that the tender of fare to the conductor was a void act, conferring no right whatever, for the simple reason that the con-

ductor had no authority to receive it. *C. C. & C. R. R. Co. v. Bartram, supra.*

Upon the starting of the train, it was of course the duty of the conductor in charge, as soon as practicable, and as is customary on such freight trains on well regulated roads, to repair to the caboose and call upon passengers for the production of tickets, so as not to delay unreasonably the enforcement of the regulation by the ejection of those not rightfully there. In this instance, we discover no evidence of unreasonable delay. According to the testimony of the defendant in error himself, the train was stopped to put him off within two and a half miles from the station, while the more satisfactory evidence is that it was but about half that distance. But taking his own estimate as correct, if proper allowance be made for the distance run while signaling and stopping the train, it is quite evident there was no unusual delay in this particular. Indeed we do not understand that it is claimed there was unreasonable delay after leaving the station in calling for the ticket, and stopping the train, but that the failure in the performance of duty by the company lay entirely in the neglect to enforce the regulation before starting. And such, as we gather from the instructions, was the view taken by the court.

The only other objectionable feature of the charge consists in its giving importance to the attack of cholera-morbus, from which the defendant in error suffered at Nebraska City, three days after being put off the train. There was no such relation between the alleged cause and effect, shown by the evidence, as to justify the making of that brief ailment a factor in the cause.

For these reasons, the judgment must be reversed and a new trial awarded.

REVERSED AND REMANDED.

MAXWELL, CH. J., dissenting.

I concur in the reversal of the judgment in this case upon the sole ground that the damages are excessive. I also concur in the proposition that a railroad company running regular passenger trains for the carriage of passengers may exclude them from freight trains altogether, or as a condition precedent to entering the cars, may require passengers to purchase tickets. But no case has been cited, and I think none can be found, where, even if the rules require the passenger to purchase a ticket before entering the cars, if he is permitted to enter and take a seat therein, he can be ejected between two stations, if he offers to pay his fare. The rule must be enforced by excluding him from the car before the train leaves the station, not by ejecting him between stations. The by-laws of a corporation must not infringe the charter of the corporation or the laws of the state, must not be unreasonable, and must be within the range of the general powers of the corporation. 1 Redfield on Railways and cases cited in note 1. Section 107 of chapter 11 of the General Statutes, entitled "Railroad Companies," provides that "if any passenger shall refuse to pay his fare, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any place within five miles of any station." The powers of a corporation are derived entirely from the statute. A railroad company is a common carrier for hire of passengers and freight. The law is the paramount rule of action for the government of its affairs, and no rule can have any validity that contravenes the statute. A by-law, therefore, to expel a passenger between stations who offers to pay

his fare is an absolute nullity. If it were not so the corporation would be greater than the power creating it. This question was before the supreme court of Illinois in the case of *Illinois Central R. R. Co. v. Sutton*, 58 Ill., 391, 401. The court say: "If the order was given conductors of freight trains, before leaving a station, to visit the caboose car and demand a sight of the tickets, and if any passenger is there without a ticket, peremptorily decline to take him, and if he persists in remaining, then forcible, if necessary, expel him from the car. Either this rule must be adopted, or the conductors of such train must be authorized to receive fares." In the case of *Roach v. Karr*, 18 Kans., 529, the court, in speaking of the enforcement of the rule, say: "Such a rule ought also to be enforced by *preventing* passengers from taking passage on a freight train, rather than by *putting them off* after half of the journey is completed." If passengers lawfully entering a car and ready and willing to pay fare, can be ejected from the cars miles away from any station, or perhaps from a residence, for the simple failure to comply with a rule of which they may have been ignorant, it will be attended with great hardship. And as the rule must apply to all, alike to the infant and invalid as well as the robust and strong, and at all seasons of the year, there is reason to suppose that in some cases, at least, its enforcement will be attended with permanent injury to the health, if not loss of life.

11	186
11	202
11	186
32	317
11	186
42	536
11	186
52	189

SIMPSON S. REYNOLDS, PLAINTIFF IN ERROR, v. THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA, DEFENDANT IN ERROR.

1. **Evidence:** INSUFFICIENT TO SUSTAIN VERDICT. In the case presented, the plaintiff introduced his evidence and rested. Thereupon the defendant moved a non-suit, on the ground of the insufficiency of the evidence, which was granted. Evidence examined and held inadequate to support a verdict for the plaintiff.
2. ———: NON-SUIT. When the evidence produced by the plaintiff is not sufficient to support a verdict in his favor, a non-suit is proper.
3. **Breach of Contract.** In an action to recover damages for breach of contract by the defendant, if the plaintiff himself is in inexcusable default, he cannot recover.
4. **Unexecuted Waiver:** CONSIDERATION ESSENTIAL. A sufficient consideration is essential to the enforcement of an unexecuted agreement to waive prompt payment according to the conditions of a written contract for the sale of land, where time is made essential.

ERROR to the district court of Lancaster county.
Tried below before POUND, J.

Lamb, Billingsley & Lambertson, for plaintiff in error. The pre-emption contract, and payments and improvements under it, was not a mere option agreement to purchase. *Perkins v. Hadsell*, 50 Ill., 216. If it were, its terms had been waived and varied by the parties. The reply put in issue conditions precedent. *Birdsall v. Carter*, 5 Neb., 517. *Nichols v. Hail*, 4 Neb., 214. *Livesey v. Hotel*, 5 Neb., 50. *Kellogg v. Lavender*, 9 Neb., 418. The question of waiver is one of fact. *Page v. Greeley*, 75 Ill., 400. If vendor has disabled himself from conveying, purchase money and damages may be recovered. *Eaton v. Redick*, 1 Neb., 305. *Foley v. McKeegan*, 4 Ia., 2. *Pumpelly v. Phelps*, 40 N. Y., 60

Reynolds v. B. & M. R. R. Co.

T. M. Marquett, for defendant in error. Plaintiff was in default. *Longworth v. Mitchell*, 26 Ohio St., 334, *Gilbert v. Port*, 28 Id., 277. The right to improvements was forfeited. The petition makes no such claim. *Hanschid v. Stafford*, 25 Ia., 428. *Smith v. Trustees*, 28 Id., 500. Petition alleges absolute contract of sale—proof shows unfulfilled option to buy. There was no new consideration for the waiver alleged. *R. R. Co. v. Buckley*, 21 Kans., 296. *Hughes v. Davis*, 40 Cal., 117. *Bliss v. Shwartz*, 65 N. Y., 448.

LAKE, J.

The action below was based upon an alleged breach, by the defendant, of a contract known as a "pre-emption certificate," issued by the company to the plaintiff on the 15th day of April, 1872. By the terms of this certificate the defendant bound itself to sell the land in controversy to the plaintiff, upon certain terms and conditions, to be embodied in a more formal contract, after the company had obtained its patent from the United States. This formal contract, it was stipulated, should be applied for by the purchaser within sixty days after receiving notice, which the company was to give, that the patent had been obtained. Among the several provisions of this pre-emption certificate, was this: "In case the pre-emption applicant shall fail to pay for, or enter into contract to pay for the land which he may have pre-empted before the expiration of said sixty days, he will thereby lose all benefit of his pre-emption right, and the money which he may have paid thereon will be forfeited. In case a pre-emption applicant shall neglect or refuse to comply with the terms and conditions above named, and shall so forfeit his pre-emption right, he will also forfeit all improvements that he may have made upon the land."

As to what the terms of the contract subsequently

to be made were to be, the petition is almost silent. In one place it is alleged that the company agreed to "make a contract with the plaintiff in the usual form, for the sale of the land, * * * which contract was to be in usual form, for warranty deed of said premises when the same was paid for, in accordance with the terms then agreed upon between this plaintiff and the said defendant, of long credit, or ten years credit, but which terms of payment were afterwards, by mutual agreement, * * * wholly set aside and waived." This is the substance of the charge on this point, although several times repeated with slightly changed phraseology. This informs us that the contract was to be in "*usual form*," and for a "warranty deed" of the land, *when "paid for* in accordance with the terms agreed upon." But contracts for the sale of realty are not of so uniform a structure that courts can judicially know the terms of a particular one by being told that it is for the sale of land. So, too, of the terms of payment—the several amounts, and time of each—the court cannot know them by being told that they were those "agreed upon," especially when this is immediately followed by the declaration that they were afterwards "wholly set aside and waived," without any others being substituted for them.

The plaintiff, however, concedes that he did not comply with the terms of payment, whatever they were, whereby, according to a clause of the certificate above quoted, he lost "all benefit of his pre-emption right," his payments previously made, and improvements on the land, unless in some way relieved from the forfeiture. And he endeavors to thus relieve himself by alleging that "during the year 1875, the said defendant, to induce the plaintiff to continue to cultivate and improve the said premises, and enhance their value, and to finally pay for the same, expressly agreed to

waive, and did waive any and all further payment for said lands, according to the terms of said contract, so far only as the time of payment was concerned, and expressly agreed with the plaintiff if he would not abandon said lands and said contract," which he says he then contemplated doing, "but would go on and cultivate, and improve the same, that the plaintiff might pay for the same whenever it should become convenient" for him to do so. This matter thus plead in avoidance of the otherwise conceded forfeiture was in issue, and on the trial was the pivotal question.

We have exceedingly grave doubts as to whether the petition states a cause of action, but, without expressly deciding this question, we will pass to the evidence of the alleged waiver of payments, and see whether the non-suit granted by the court below, which is the principal error complained of, was proper.

From a copy of the pre-emption certificate, and the other evidence offered by the plaintiff, we learn that the consideration to be paid for the land was ten dollars per acre. Also that the term "long credit," mentioned in the petition, meant that for each of the first two years succeeding the purchase, the plaintiff was obliged to pay annually, in advance, six per cent interest on the principal, and annually thereafter one-ninth of the principal, together with interest as above on the amount remaining unpaid. Of these several payments thus provided for in the pre-emption certificate, the only ones made were those of the interest for the first three years, the last two, however, long after they were due; the last one being August 17th, 1874, of the interest due April 15th, of that year. No other payments have ever been made, or tendered. And it is conceded that on October 31st, 1877, the defendant sold the same land to one Allen Price, which is the breach of contract complained of.

As to the alleged waiver of payment, "according to the terms of said contract," there was really no evidence for the jury to pass upon except the receipt of the two installments of over-due interest. All that can reasonably be claimed from the other acts and sayings of the agents of the company is, that they evinced a decided willingness to not insist upon a literal compliance with the agreement in this particular. This disposition is clearly shown by the two letters introduced by the plaintiff, and on which he chiefly relies to make out his alleged case of waiver. The first of these letters was written June 24th, 1875, in answer to one from the plaintiff, giving his reasons for not meeting payments previously due, and then unpaid. It was in these words: "I hope matters are not as bad with you as you state in yours of to-day; but if it will be any help to you, we will wait until you can feel it is your interest without injuring yourself, to make us a payment on account. We want all we can get, but, nevertheless, not so much so as to oppress those who are in reality building the country up, and you will always find the company willing to meet you, or any of their purchasers half-way, just so long as they are satisfied that they are helping honest and stirring men, who are struggling to do the best they can under the circumstances.

"Signed,

A. E. TOUZALIN,
"Land Commissioner."

This waiver, if it may be called such, was not only without consideration, which was essential, and purely voluntary, but fixed no time within which the overdue payments would be received. In this respect it falls far short of supporting the allegation that the times of making payments were postponed as an inducement to the plaintiff not to abandon the land, etc. So far as the evidence shows, nothing more of importance oc-

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curred until June 8th, 1877, at which time *four-ninths* of the principal, three years' interest, together with a large amount which the company had paid for taxes on the land, were due. On that day, another letter from the same source was sent to the plaintiff, of which the following is a copy:

"Simpson S. Reynolds, Esq., Seward, Neb.:

"DEAR SIR—Having received nothing from you since Sept. 30th, 1874, and having compelled us to pay the taxes for several years on this land, we are inclined to think that it is time for you to do something toward payment of arrearages on your contracts. The condition is such that the land at present is not a source of revenue to us, and we must ask what arrangements you can make respecting the payments long past due, as we cannot carry you longer in this unsatisfactory manner. * * *

"Signed,

A. E. TOUZALIN, L. C."

"This letter was received by the plaintiff over four months before the company sold the land to Price, but he did not answer or pay any attention whatever to it. On his cross-examination as to this letter, the following was brought out:

Q. You never answered this last letter of the company?

A. I think not. *I thought it was none of their business.*

This certainly was a bad showing for the plaintiff himself to make, and it hardly commends him to the court as one who was honestly striving to meet the obligations he had assumed. The company had dealt very leniently with him for several years, and doubtless would have continued to do so, had he evinced any disposition to do what was reasonable himself. Where one is so flagrantly in default himself in the

performance of a contract as was this plaintiff, and shows no desire or willingness to perform his part of it, he is certainly in no situation to complain or to seek damages for its non-performance by another.

After a careful consideration of the evidence produced by the plaintiff, we think the company was justified in treating the pre-emption agreement as abandoned by the plaintiff, and in selling the land to another. There was not evidence that would have justified a verdict for the plaintiff, and the non-suit therefore was properly ordered.

JUDGMENT AFFIRMED.

THE MISSOURI VALLEY LAND COMPANY, APPELLEE, v.
D. W. BUSHNELL AND JOHN POLLOCK, APPELLANTS.

1. **Practice: PLEADING: DEMURRER.** A demurrer to a petition only lies to the statement of facts constituting the supposed cause of action, not to the prayer for relief, which may be much in excess of what those facts warrant the court to grant.
2. ———: ———: **JOINDER IN DEMURRER.** It is a well-settled rule of practice that where several defendants join in a general demurrer to a petition which states a cause of action as to one of them, the demurrer will be overruled.
3. **Corporate Power.** Want of capacity in a corporation, which is the vendor in a contract for the sale of real estate, to take a title to or hold such property, cannot be successfully urged by the vendee or his assignee, to defeat a recovery of the agreed price, in an action on the contract.
4. ———. Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign only can object. It is valid until assailed in a direct proceeding for that purpose.
5. **Contract for the sale of real estate valid although not witnessed or acknowledged.** As between the parties to it, and as to those having knowledge of its existence, a written contract for the sale of real estate is valid although neither witnessed nor acknowledged.

11 192
27 580

11 192
34 423

11 192
39 675

11 192
41 612

11 192
142 876

11 192
48 453
48 661

11 192
49 63

50 658
53 406

54 228

11 192
58 487

Missouri Valley Land Co. v. Bushnell.

6. **Fraud as a defense.** To make fraudulent acts available as a defense to an action, they must appear to have prejudiced him who pleads them. And in the absence of averment and proof to that effect, fraud cannot be presumed to have been injurious.

APPEAL from Washington county. One Blair contracted to sell one Bushnell certain lots, then assigned his interest to the S. C. & P. R. R. Co., appellee's grantor. Bushnell, who was to make deferred payments and pay subsequent taxes, assigned his interest to Pollock. Action to collect deferred payments and taxes paid. Defendants demurred, and demurrer being overruled, answered. Decree for plaintiffs and sale ordered, from which defendants appeal. Tried below before SAVAGE, J.

L. W. Osborn, for appellants, cited Gen. Stat., secs. 74, 75, 81, 85, 95, and 97, chap. XI. *Id.*, 203. R. S., 1866, chap. 43, sec. 63.

Joy & Wright, for appellee, cited *Vose v. Woodford*, 29 Ohio St., 245. *Pottinger v. Garrison*, 3 Neb., 221. *Cowell v. Col. Springs Co.*, U. S., Oct. T., 1879. *Am. & Christian Union v. Yount*, U. S., Oct. T., 1879. *So. Pac. Ry. Co. v. Orton*, 9 Law Reporter, 133. *C. B. & Q. v. Lewis*, 4 N. W. R., 852. *State v. Sherman*, 22 Ohio St., 433. *National Bank v. Matthews*, 98 U. S., 621. *Wilber v. Paine*, 1 Ohio, 254. *Kerr on Fraud and Mistake*, 73-74.

LAKE, J.

The first objection made by appellants' counsel to the action of the district court is that "the demurrer to the amended petition asking a judgment for deficiency should have been sustained as to the defendant Pollock, he being only an assignee, and there being no privity of contract between him and the plaintiff."

To this objection it may be answered: *first*, that no such judgment is asked or rendered against the defendant Pollock; and *second*, that even if such had been the prayer of the petition, it would have been no ground of demurrer. A demurrer to a petition only lies to the statement of facts constituting the supposed cause of action, not to the prayer for relief, which may be much in excess of what those facts warrant the court to grant. Here the demurrer is by both defendants jointly and general. In such case if the petition state a cause of action against either of the defendants, the demurrer will be overruled as to both. This is a rule of practice which is well settled in this state. *Dunn v. Gibson*, 9 Neb., 513. We are not forced, however, to apply this rule, for, as we think, the facts alleged amply support the judgment which the court gave.

Under the second head of the appellants' brief, it is contended that the demurrer should have been sustained as to the defendant Bushnell also. This point is aimed at the very root of the plaintiff's case, the ground taken being that, as shown by the petition, the contract for the sale of the lots to Bushnell having been made by an agent, and in the interest of the Sioux City and Pacific Railroad Company, was absolutely void, for the reason that this company was not authorized by its charter to hold or deal in real estate of this description. Admitting all that is claimed as to the want of authority on the part of this company by its charter to take or hold real estate except for certain specified purposes, still the conclusion sought to be drawn therefrom does not follow. Authorities of the highest character are abundant to the effect that the appellants cannot successfully urge such incapacity, even if it existed, as a defense to an action upon this contract through which they have acquired and enjoyed property rights in the lots in question. Bush-

Missouri Valley Land Co. v. Bushnell.

nell clearly recognized the authority of his vendor by taking the contract, and he does not complain that he has not received all that it was contemplated he should under it.

In *National Bank v. Matthews*, 8 Otto, 621, it is said that even "where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign only can object. It is valid until assailed in a direct proceeding instituted for that purpose." To the same effect are the following: *Cowel v. Springs Company*, 10 Otto, 55. *Christian Union v. Yount*, 11 Id., 352. *Am. Bible Society v. Marshall*, 15 Ohio St., 537. *Notoma Water and Mining Co. v. Clarkin*, 14 Cal., 543.

In view of the concession made by the appellants, that the railroad company had power not only to acquire by gift, or purchase, such real estate as was necessary for the construction and operation of its road, but also to hold and control such other land as may have been granted to aid such construction, we might have disposed of this point upon this other and equally satisfactory ground, viz.: That it is not shown, either by averment or proof, how, or for what purpose, the interest of the company in this real estate, which Blair controlled for its benefit, was acquired. We are not at liberty to presume that in these dealings the company transcended its powers. Even if the plea of *ultra vires* were available to the defendants, it would be required of them first to aver and prove that the lands were not such as the company could legally hold and control.

The *third* point is barely worthy of a passing notice. It is that the contract, although in writing, "is void, and not sufficient in law to create an interest or estate in lands." And why so? Simply because it was not witnessed and acknowledged as is required in the case of deeds of real estate under the recording act. The

record before us presents no ground on which to raise this question, for both the answer and the stipulation of facts admit the execution of the contract by the parties as alleged in the petition. But without this concession as between the parties to it and their privies, no rights of innocent third persons intervening, this contract is effective for all that its terms import. It is not a deed, as this word is commonly understood, but simply an agreement to make a deed upon the performance of certain stipulations by the purchaser of the lots. As between the parties to it, and also as to those having knowledge of its existence, it answers every requirement of the statute to secure to the vendee the whole interest which it purports to convey, and to protect him in it without further formality. Sec. 5, Ch. 25, Gen. Statutes, 392.

The *fourth* and only other point made in the brief, is that of assumed fraud in the auction sale of lots in the town of Blair, at which this purchase was made, by the employment of by-bidders to advance the prices, and by oral declarations on the day of sale that all purchasers of lots on certain streets would be required to make valuable improvements thereon as a condition precedent to the delivery of deeds therefor, which condition in several instances was not insisted upon, whereby, as is argued, those streets were not improved to the extent that purchasers of lots in that vicinity had a right to expect, and would have realized had the published conditions been strictly enforced in all cases.

There is no merit in this objection. It is not averred that these acts of alleged fraud resulted in any injury whatever to the defendants. It is not even intimated that these by-bidders bid on the two lots purchased by Bushnell, nor that their presence induced him to agree to pay more than they were worth, or than he

Roy v. McPherson.

otherwise would have done. There is nothing either in the answer or evidence which would justify a court in drawing the inference that any of these acts of fraud influenced the conduct of either of the defendants in the remotest degree, or caused them the slightest damage. To make fraudulent acts available as a defense to an action, they must appear to have prejudiced him who pleads them. In the absence of averment and proof to that effect, fraud cannot be presumed to have been injurious. *Clark et al. v. Tennant*, 5 Neb., 549. We see no reason for disturbing the judgment of the district court, and it is affirmed.

JUDGMENT AFFIRMED.

THIRZA ROY, APPELLEE, v. N. B. MCPHERSON, AND
FOSTER & TOWSLEE, APPELLANTS.

Equity: SECRET TRUST: CREDITORS OF TRUSTEE. In March, 1864, the plaintiff, Mrs. Roy, by her brother, purchased the land in controversy, with her own money, derived from the estate of her deceased father. The title, contrary to her directions, was taken to her husband, George Roy, instead of herself, which fact she learned immediately upon the delivery of the deed, which was duly recorded. So far as shown, she made no objection, but permitted him to retain the title until August, 1877, when he conveyed it to a third person, with a view of having him convey it to her, which he did in March, 1878. During the time George Roy so held the title he engaged in mercantile ventures, obtaining credit and contracting debts on the faith of his being the absolute owner of the land. These debts were put in judgment, which were liens on the land when George Roy parted with the legal title. Afterwards executions were issued and levied on the land, which was about to be sold by the sheriff, when this action was brought to enjoin the sale. *Held*, that, as between Mrs. Roy and these creditors, their equity must be preferred, and the injunction denied.

11	197
11	248
18	822
18	841

11	197
30	560
31	450
31	649

11	197
42	184

11	197
50	606
55	294

APPEAL from the district court for Richardson county.
Tried below before WEAVER, J.

George P. Uhl, for appellants, cited Story's Eq. Jur., secs. 384 to 392, 1536. 1 Greenl. Ev., 207. Tyler on Inf. & Cov., 448. *Russell v. Long*, 8 N. W. R., 75. *Hatch v. Gray*, 21 Ia., 29. *Schweizer v. Tracy*, 76 Ill., 350. *Young v. Hibbs*, 5 Neb., 433. *Bank v. Shaffer*, 9 Neb. 1.

E. W. Thomas, for appellee, contended that plaintiff's possession was notice of her rights, and that she occupied the land as a homestead. Cited on question of estoppel *McAfferty v. Conover*, 7 Ohio St., 105. *Moore v. Reavies*, 15 Kans., 150. *Johnston v. Turner*, 29 Ark., 280. Thompson on Homesteads, sec. 408.

LAKE, J.

The debts on which the several judgments in favor of the appellants, McPherson and Foster & Towslee, were rendered, were contracted by George Roy, the husband of the plaintiff, while he was the ostensible owner of the land in controversy, the legal title being in him in fact, and as shown by the record of deeds of the proper county. And there the title still was until after those parties had obtained their judgments, and the same had become liens thereon.

The finding of the district court on the pleadings and evidence was, *first*, generally for the plaintiff, which was followed by a special finding on a single point in these words, viz.: "That the defendants, Foster & Towslee, gave the credit to George Roy solely upon the representation of said Roy that he owned the land; and that the record showed the title to be in said George Roy." We find that this special finding is fully supported by the evidence, which shows, with-

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out contradiction, that before giving the credit to Roy they took the precaution to search the records of deeds of Richardson county, and found the legal title to be in him, where it had rested for nearly eight years. And this fact was the inducement for giving the credit, which, without it, would have been withheld. The evidence also shows that Roy is insolvent and unable to pay his debts. These facts are placed beyond controversy.

As to the claim of the defendant, McPherson, there was no special finding, but an examination of the evidence convinces us that a large portion, if not the whole of it, was for supplies furnished for the use of Roy's family, and while the title to the land was in him. Therefore, on general principles, it seems but equitable that, as against the claim of Mrs. Roy, he should be permitted to look to the land for payment.

But what are the equities of Mrs. Roy, as shown by the record, in respect to this land? At the time of its purchase the land was, doubtless, paid for with money obtained by her from the estate of her deceased father; and the intention may have been, as she says it was, to take the title to herself, instead of having it conveyed to her husband. However, her full knowledge, immediately upon the delivery of the deed, that he was the grantee, together with the fact that she let the title remain in him during so many years, is pretty strong evidence to the contrary. Whatever her intention in this matter may have been, her acquiescence in what was done for so many years, whereby George Roy was given a credit among business men which otherwise he would not have had, and was enabled to contract these debts, must be held to estop her now from asserting her equity as against that of creditors who, in consequence of her acquiescence and silence, have been misled, and thus induced to part with their property.

Under the head of "Constructive Fraud," Story, in his Equity Jurisprudence, says: "Another class of constructive frauds of a large extent, and over which courts of equity exercise an exclusive and very salutary jurisdiction, consists of those where a man designedly or knowingly produces a false impression upon another, who is thereby drawn into some act or contract injurious to his own rights or interests." And further: "That if a party by the willful suggestion of a falsehood, is the cause of prejudice to another, who has a right to a full and correct representation of the fact, his claim ought in conscience to be postponed to that of the person whose confidence was induced by his representation. And there can be no real difference between an express representation and one that is naturally or necessarily implied from the circumstances. The wholesome maxim of the law upon this subject is, that a party who enables another to commit a fraud, is answerable for the consequences."

If we concede all that the plaintiff claims respecting the purchase and payment for this land, and consider her laches in leaving the title in her husband for so many years, and under such circumstances as are here proved, it is impossible under the rule just stated to hold that her equities are equal to those of the defendants. Whether she intended it or not, the legal title was placed in George Roy, and she knew it. So far as the public was advised, she laid no claim whatever to it other than as his wife. She stood by and saw him engage in business ventures, and knew, or rather, was bound to know, that his apparent ownership of the land assisted in giving him credit on which debts would very likely be contracted. And debts were in fact contracted on the strength of such ownership. After all this, it would be the extreme of injustice to say that her secret equity is superior to the lien acquired by

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these defendants. "It is the dictate of natural justice that he who, having a right or interest, by his conduct influences another to act on the faith of its non-existence, or that it will not be asserted, shall not be allowed to afterwards maintain it to his prejudice."

McGovern v. Knox, 21 Ohio St., 547.

We are of the opinion that the equities of the case are with the defendants. Wherefore the decree of the district court must be reversed, the injunction dissolved, and the case dismissed at the costs of plaintiff.

JUDGMENT ACCORDINGLY.

11	301
32	317
11	302
61	317

LUDWIG LENT, PLAINTIFF IN ERROR, V. THE B. & M.
R. R. Co. IN NEBRASKA, DEFENDANT IN ERROR.

1. **Contract for Sale of Land: TIME ESSENTIAL: WAIVER.** Where in a contract for the sale of land on credit, payment to be made in installments on days definitely fixed, and time being essential, with penalty of forfeiture for want of punctuality, the mere receipt of one or more payments overdue does not of itself operate as a waiver of the right to declare a forfeiture for non-payment of installments subsequently falling due.
2. ———. The simple act of receiving a payment after the day when the payee was bound to accept it, without more, is no excuse for laches in making future payments.
3. **Evidence: PRACTICE: DIRECTING A VERDICT.** Where there is no evidence before a jury authorizing a verdict in favor of the plaintiff, it is proper for the court to direct them to find for the defendant.

ERROR from the district court for Saunders county.
Tried below before Post, J.

T. B. Wilson and *M. H. Sessions*, for plaintiff in error, contended there was a waiver of the forfeiture

of the contract, and whether there was or not was a question for the jury. *Dilleber v. Insurance Co.*, 76 N. Y., 570. *Prentice v. Ins. Co.*, 77 N. Y., 483. *Insurance Co. v. French*, 30 Ohio St., 240. A non-suit should not have been granted. *Sutton v. Wauwatoosa*, 29 Wis., 33. *Grant v. Cropsey*, 8 Neb., 209. *State Ins. Co. v. Todd*, 83 Pa. St., 272.

Marquett & Deveese, for defendant in error.

LAKE, J.

This case in principle is not distinguishable from that of *Reynolds v. The B. & M. R. R. Co.*, ante p. 186, decided at this term. And much of what we said in deciding that case is applicable here. In this case, however, a formal contract had actually been made for the sale and purchase of the land in question, which contained stringent provisions, making, as counsel for the plaintiff concede, punctuality of payment essential, and, unless waived by the defendant, constituting a complete bar to a recovery of the damages sought.

To show precisely the ground on which counsel for the plaintiff stand in claiming there was a waiver here, we quote from their brief that, on the 3d day of March, 1876, "the plaintiff having made no payments since August 12, 1873, all of his rights, privileges, and improvements, under the contract would have become forfeited if the defendant had made the election to cancel the contract, and claim the forfeiture by reason of the non-payment. Instead of electing to do this, it received from the plaintiff the sum of \$170.88, the amount of the second payment on said contract, including interest to that date; also the further sum of \$60.27 on account of installment due August 12th, 1875. This in law was a waiver of the forfeiture in the contract by reason of the non-payment when due."

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No one would contend of course that, as to the installments received, there was not a waiver; but the argument of counsel goes further, and amounts to this, that the acceptance of payments overdue is a waiver of the matter of time, not only as to them, but also as to those falling due thereafter. Such, however, is not the law. The proposition is supported by neither reason nor authority. The simple act of receiving a payment after the day when the payee was bound to accept it, without more, is no excuse for laches as to future payments. The effect of the acceptance is exhausted upon the payment made, and as to those following, the provisions of the contract are left to operate with unimpaired force. *Phelps v. I. C. R. R. Co.*, 63 Ill., 468. *Stow v. Russell*, 36 Ill., 32. *Green v. Green*, 9 Cow., 46.

But was there any additional evidence before the jury of a waiver as to the two payments that fell due on the 12th day of August, 1876 and 1877? Nothing else is relied on but the testimony of the plaintiff to the fact that at the time of making the payment above referred to, the agent of the company accepting it, in response to his complaint of "hard times," and of the difficulties under which he labored, said: "That is all right, just go on and work, and pay as fast as you can." But this is no evidence of waiver or even of an intention on the part of either of the parties to interfere in any manner with the provisions of the written contract, requiring of the plaintiff prompt payment. It was at most only a reminder that his interests required great efforts at his hands, and by way of encouragement, an intimation that the company was not disposed to oppress him. So far as appears, no allusion was made to the subsequent installments, and it is more than likely this remark of the agent, from which so much is claimed, was made with reference to that of 1875, of which con-

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siderably less than half was then paid, and the balance about seven months overdue. Besides the total want of all allusion to the matter of time, there was no consideration, a thing essential to the enforcement of an unexecuted agreement of waiver.

There being no evidence of waiver as to the several installments falling due after 1875, there was nothing on which a verdict for the plaintiff could stand. The order of the court, therefore, directing the jury to find for the defendant was proper, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

ANNA M. GOODRICH, PLAINTIFF IN ERROR, V. THE CITY
OF OMAHA, DEFENDANT IN ERROR.

Appeal: WAIVER: JURISDICTION. Appeal by plaintiff in error to the district court from the award of damages to her by the appraisers appointed to assess the damages to property holders caused by a change of grade of a street of the city. After a jury was empaneled and sworn, and a witness sworn and examined by appellant, and cross-examined by appellee, appellee moved to dismiss the appeal for the reason that the same was not taken in time. Motion sustained and the appeal dismissed. On error to this court, *held*, that whatever might have been the right of the appellee, had it moved in time, after allowing the appeal to stand for a year and a half, and participating in the selection of a jury to try the cause and actually entering upon the trial, it was too late to avail itself of such rights, and that to entertain a motion to dismiss for such cause at that stage of the trial was error.

ERROR to the district court for Douglas county.
Tried below before SAVAGE, J.

John D. Howe and *Thurston & Hall*, for plaintiff in error, cited on the subject of waiver, *Pickersgill v. Reed*,

11	204
11	48
15	488
16	44
17	173
11	904
99	190
11	204
37	...
11	204
46	887

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7 Hun., 636. *Carothers v. Cummings*, 63 Pa. St., 199. *Hoffman v. Dawson*, 11 Pa. St., 280. *Sleck v. King*, 3 Pa. St., 211. *Marks v. Swearingen*, Id., 454. *D. & P. R. R. Co. v. Crittenden*, 5 Ia., 514. *D. & P. R. R. Co. v. Shinn*, 5 Ia., 516. *Wood v. O'Ferrall*, 19 Ohio St., 427. *Kane v. U. P. R. R. Co.*, 5 Neb., 106. *Harrington v. Heath*, 15 Ohio, 483-8. *Fee v. Big S. Co.*, 13 Ohio St., 563. *O'Hagen v. O'Hagen*, 14 Ia., 264. *Danforth v. Thompson*, 34 Ia., 243. *Hottenback v. Hoskins*, 12 Ia., 109. *Bridgman v. Wilcut*, 4 G. Greene, 563. *Wallace v. Corbitt*, 4 Ired. (N. C. L.), 45. *Arrington v. Smith*, 4 Ired., 59. *Matson v. Connelly*, 24 Ills., 142. *Hodson v. McConnel*, 12 Ills., 172. *McCall v. Leshner*, 7 Ills. (2 Gilm.), 46. *Warner v. Whittaker*, 5 Mich., 241. *Steward v. Dixon*, 6 Mich., 391. *Ex parte Ostrander*, 1 Denio, 679.

Charles F. Manderson, for defendant in error. The court had no jurisdiction, and there could be no waiver by consent of parties. *Siverburg v. State*, 30 Ark., 39. *The Lucy*, 8 Wall., 307. *Scott v. Sandford*, 19 How., 393. *Oliver v. Harvey*, 5 Oregon, 360. *D. & P. R. R. Co. v. Crittenden*, 5 Ia., 514. *Morrow v. Sullender*, 4 Neb., 375. *Verges v. Roush*, 1 Neb., 113.

COBB, J.

The plaintiff in error appealed to the district court from the award to her by the appraisers appointed to assess the damages to property holders caused by a change of grade on a certain street of the city. Her appeal was entered September 12, and notice thereof served on the mayor September 14, 1878.

On the second day of March, 1880, the cause came on for trial in the district court, both parties being present by their respective attorneys. A jury was called, empaneled, and sworn. A witness was called

by the appellant, sworn, examined by her, and cross-examined by the appellee, whereupon counsel for appellee made a motion to dismiss the appeal, for the reason that the same was not taken within the time limited by statute. Which motion was sustained by the court, and the appeal dismissed.

Upon examining the numerous authorities cited by counsel on either side, I come to the conclusion that, whatever might have been the merits of the motion to dismiss the appeal had the same been interposed in time, after allowing the appeal to stand for a year and a half, participating in the selection of a jury to try the cause, and actually entering upon the trial by cross-examining a witness, the appellee must be deemed to have waived any such objection to the appeal as that upon which the same was dismissed. For aught that appears in this case, the appellee was desirous to have the damages re-assessed by a jury, until after its attorney had heard the testimony of the first and presumably the principal witness on the part of the appellant, and had subjected such witness to the ordeal of a cross-examination. And certainly no one will fail to see the danger of a practice which would allow a party to withhold a motion to dismiss until he has, even in the slightest degree, tested the temper of the court or jury upon the merits of the case, and then bring it forward and oust the court of jurisdiction to finish the work upon which it had entered.

I do not think there is any difficulty on the question of jurisdiction in this case. The district court had jurisdiction of the subject, to try appeals from the award of damages in cases of this kind, and by coming into court and entering upon the trial, the appellee conferred upon the court jurisdiction of its person, even if it be admitted that the appeal was not made within the time limited by the statute. There can be

no doubt, either upon reason or authority, that an appellee may waive any of the limitations or other provisions of the statute made for his benefit or protection. Nor do I think there can be any doubt that he does waive them when they exist, by entering upon a trial in an appeal case upon the merits.

The statute law of Illinois limited the right of appeal from the judgments of circuit and certain county courts to cases where the judgment exceeded the sum of twenty dollars, or where it related to a franchise or freehold. In the case of *Matson et al. v. Connelly*, 24 Ill., 142, cited by counsel for plaintiff in error, the action was trespass and judgment for the plaintiff for *nineteen* dollars. The defendant appealed to the supreme court, and assigned error. The appellant made a technical joinder in error, and afterwards moved to dismiss the appeal. The court, per Judge Sidney Breese, in affirming the judgment, says: "Error having been joined, the motion to dismiss the appeal comes too late. It would have prevailed if made in the first instance, as the judgment does not amount to twenty dollars exclusive of costs, nor does it relate to a franchise or freehold."

The judgment of the district court is reversed, the appeal reinstated, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

SELDEN N. MERRIAM, PLAINTIFF IN ERROR, v. JOHN
DUNBAR, DEFENDANT IN ERROR.

Removal of Cause: costs. Although the timely filing of a proper petition and bond under the provisions of the act of Congress, approved March 3, 1875, may render it the imperative duty of the state court to make an order removing the cause to the circuit court of the United States for the proper district, yet when it does not appear from the record that the attention of the district court has ever been called to such petition and bond, nor any motion made to set aside a judgment rendered after the filing of such petition and bond, this court will deny costs in a proceeding in error to reverse such judgment.

ERROR to the district court for Otoe county. Tried below before POUND, J.

Edwin F. Warren, for plaintiff in error.

John C. Watson, for defendant in error.

COBB, J.

There can be no doubt of the right of the plaintiff in error to have the case removed to the circuit court of the United States for the proper district, upon the petition and bond set out in the record. And had he called the attention of the district court to the said petition and bond, we are bound to presume that the court would have entered an order of removal, and would not have rendered a judgment in the case. Or, had he afterwards called the attention of the district court to its erroneous judgment in the case, no doubt said court would have set it aside. And a strict adherence to the rules of practice in this court would justify the refusal of relief until the said plaintiff had first brought the matter to the attention of the district court

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and afforded it an opportunity to correct its own records. But as no substantial purpose would be served by a strict practice in this case, the judgment of the district court will be reversed, and the cause remanded, with direction to the district court to enter an order of removal, as prayed by the plaintiff in error, *nunc pro tunc*, but without costs in this court.

JUDGMENT ACCORDINGLY.

FRANK G. PARCELL, PLAINTIFF IN ERROR, V. THOMAS
McCOMBER, DEFENDANT IN ERROR.

11	209
17	178
11	209
84	08

Contract: PART PERFORMANCE. M. agreed to work for P. for one year from October 1, 1876, for the sum of \$195; worked five months, and sued for his wages March 2, 1877. *Held*, That he could recover the actual value of his labor not exceeding the rate agreed upon, less any damage sustained by P., by reason of the failure of M. to work the entire year. And *held*, further, the suit was not prematurely brought.

ERROR to the district court of Dodge county. The action was brought to recover for work and labor performed by McComber for Parcell. The answer contained four counts. 1. A general denial. 2. That labor sued for was performed under a contract for a year's service, Oct. 1, 1876, to Oct. 1, 1877; that McComber left employment Mar. 15, 1877, without cause, etc. 3. A repetition of contract set up in the 2d count, its abandonment by McComber, and claiming damages by reason thereof. 4. Certain payments made by Parcell to McComber. Demurrer to answer overruled as to 1st, 3d, and 4th counts, and sustained as to the 2d count, to which ruling Parcell excepted. Reply contained a general denial except as to time of

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beginning and quitting the labor. Trial before Post, J., and a jury. Verdict, \$27 for McComber. Motion for new trial overruled. Judgment. Parcell brought the cause here upon a petition in error.

Marshall & Sterrett, for plaintiff in error, contended that the common law rule as laid down in 2 Parsons on Contracts, note G, page 36, was in force in this state by reason of Gen. Stat., p. 159. As to time of payment, cited *Larkin v. Buck*, 11 Ohio St., 561. 3 Parsons on Contracts, 88, note B.

Marlow & Munger, for defendant in error, cited *Duncan v. Baker*, 21 Kan., 99. Where services are rendered and no time fixed for payment, payment is due when service is rendered.

COBB, J.

There is an important question presented in this case, one upon which it cannot be claimed that the authorities, either as expressed in the opinions of courts or the treatises of text writers, are agreed. Until the last fifty years it was quite generally held to be the law, both in England and in America, that where a person, having agreed to work for another for a definite period of time, voluntarily leaves such service without any fault on the part of the employer, and without his consent, before the expiration of the term, he cannot recover in any form of action for the services actually rendered. The reasoning upon which the decisions holding this view were generally sustained is well expressed by Morton, J., in delivering the opinion of the court in *Olmstead v. Beale*, 19 Pick., 528, in the following language: "The plaintiff cannot recover on his express contract, because he has not executed it on his part, and the performance is a condition precedent to

the payment. He cannot recover on a *quantum meruit* for the labor performed, because an express contract always excludes an implied one in relation to the same matter."

But in the case of *Britton v. Turner*, 6 N. H., 481, decided in 1834, a marked departure was taken from the former line of decisions. In that case, one quite parallel to the case at bar, it was held that "where a contract is made of such a character a party actually receives labor or materials, and thereby derives a benefit and advantage over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess." And again: "In fact we think the technical reasoning, that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it, that the contract being entire there can be no apportionment, and there being an express contract, no other can be implied, even upon the subsequent performance of service, is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe that the general understanding of the community is that the hired laborer shall be entitled to compensation for the service actually performed, though he not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary."

"Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, so as to make them

mutual conditions, the one precedent to the other, without a specific proviso to that effect."

This case has been quite generally though not uniformly followed, and the principles announced by it seem to be quite generally approved by the profession and the people, and while according much weight to some of the arguments on the other side, I think it would be unsafe to adopt them.

The well considered case of *Duncan v. Baker*, 21 Kans., 99, contains the latest adjudication of the questions involved in this case to which my attention has been called. After an exhaustive review of the authorities, the court reaches the same conclusions as those announced in *Britton v. Turner*. And so I think the law may be considered to be pretty generally settled throughout the western states.

The point made by the counsel for the plaintiff in error in their brief, that the action was prematurely brought, cannot be sustained. Besides, not having been made directly in the answer, there was evidence from which the jury might, and no doubt did, infer that it was the understanding between the parties that the wages should be paid from time to time, according to needs of the defendant in error. I quote from the testimony of the plaintiff in error:

Q. - Was there anything said at the time of the contract in regard to the time of payment?

A. We just agreed on the price for a year; there was nothing said about the payments at all.

Q. There was no agreement that any part of this should be paid during the time of service?

A. There was not a word said about it; he had been working for me before, and he drew money whenever he wanted it * * *

The evidence, as well as the answer of the plaintiff in error, shows that some payments were made on the

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work as it progressed, all of which was, I think, sufficient to justify the jury in coming to the conclusion which they reached by their verdict.

Some minor points were made upon the admission and rejection of testimony. But upon a careful examination, I do not think either of them sufficient to control the final disposition of the case.

It follows therefore that the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

JACOB E. MARKEL AND THOMAS SWOBE, PLAINTIFFS IN
ERROR, V. JOSEPH MOUDY AND OTHERS, DEFENDANTS IN
ERROR.

11	213
12	377
13	323
20	244
23	51
23	682
11	213
46	708

1. **Deceit: EVIDENCE.** In an action for deceit in the sale of an eating house, fixtures, and furniture, by false representations as to the amount of business done, and profits realized by the sellers while keeping the house, and as to what the business would be in the future, *held*, that the representations as to the past business were material and admissible in evidence, but that those concerning the future were not.
2. **Evidence by Comparison.** A comparison between the respective styles in which the house was kept by the plaintiffs and the defendants, together with the material circumstances attending each, was admissible only as tending to show that the representations, if made, were false. A comparison between the manner in which the house was kept by the plaintiffs and by strangers, was immaterial and inadmissible.
3. **Charge to Jury.** In charging a jury, undue prominence should not be given to one branch or item of evidence, by particular mention, to the disparagement of the rest.
4. **Damages.** The rule of damages in this case held to be simply the difference, if any, between the price paid for the property and its actual value at the time of the purchase.

ERROR to the district court of Dodge county. Tried below before Post, J.

Marlow & Munger, for plaintiffs in error, cited *Fouty v. Fouty*, 84 Ind., 488. *State v. Prather*, 44 Id., 287. *Hazlett v. Burge*, 22 Ia., 585. *Morrison v. Koch*, 32 Wis., 254.

E. F. Gray, for defendant in error, cited *Shaeffer v. Sleude*, 7 Blackf., 178. *Nowlan v. Cain*, 8 Allen, 261. *Miller v. Barber*, 66 N. Y., 558. *Faribault v. Slater*, 13 Minn., 228. Smith Lead. Cas., 284, 301. Cooley on Torts, 491. *Sandford v. Handy*, 23 Wend., 260. *Sharp v. Mayor*, 40 Barb., 256. 2 Wharton Ev: *Simar v. Conady*, 58 N. Y., 298. 3 Wait's Actions and Defenses, 436. *Allen v. Hart*, 72 Ill., 104. *Martin v. Jordan*, 60 Me., 581.

LAKE, J.

This is a petition in error from Dodge county. The action below was for damages caused by deceit in the sale of an eating house, fixtures, and furniture, situated in Fremont, on the line of the Union Pacific railroad.

The alleged deception consisted of false representations as to the amount of profit realized by the sellers from the business of the house during the preceding year, and also as to what the purchasers would realize from the business in the future. This being in issue, evidence tending to prove such representations to have been made was offered, and admitted against objections by the defendants on the ground of immateriality. The admission of this evidence is now made a ground of alleged error.

The averment of false representations as to the

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amount of business done by Markel & Co. was material, and the evidence to support it clearly admissible. Not so, however, of that respecting the future business of the house. What would be done thereafter it was impossible then to know. Whether the business of succeeding years would be large or small, profitable or otherwise, depended upon so many different circumstances, which might or might not happen, that its measurement in advance, as the purchasers must have known, or rather were bound to know, rested on mere conjecture. If the sellers gave truthful information concerning *existing* facts and circumstances inquired of, that was all the purchasers had a right to expect, or to confide in as coming from them. With this, they were in as favorable a situation to judge of the future business of the house as were Markel & Co., and became subject to the rule, *caveat emptor*. *Morrison v. Koch*, 32 Wis., 245. *Hazlett v. Burge*, 22 Ia., 535. *State v. Prather et al.*, 44 Ind., 287. *Perkins v. Lougee*, 6 Neb., 220. Chitty on Contracts, 398 (marginal).

Counsel for Markel & Co. even contend in argument that inasmuch as the business of keeping the eating house was not mentioned in the contract as a subject of sale, their representations of what they had realized therefrom were immaterial. To this view we cannot give assent. To a purchaser of this sort of property, the amount of business being done in it, or that has been done, under known circumstances, is doubtless a very important item in determining its value. This house was bought by the defendants in error, as Markel & Co. well understood, for the purpose of engaging in the business for which it was intended, and for which it was then being used. There is no pretence that it was bought for any other use, or that it was adapted to any other than the one made of it by Markel & Co. We regard *these* representations, therefore,

they being of an existing fact, peculiarly within the knowledge of the seller, as very material evidence, and that they were properly admitted. In *Hutchinson v. Morley*, 7 Scott, 341, it was held that misrepresentations as to the amount of business done at a public house were good ground for avoiding a sale of fixtures, "although the contract excluded the good will." And the same facts are admissible in evidence, whether the action be to avoid the sale, or to recover damages occasioned by it.

It is also assigned for error that evidence was admitted to show how the house was kept by the defendants in error, in comparison with the style in which it was subsequently kept by another party. This evidence was inadmissible. The only comparison that could properly have been made was as between the styles maintained by these parties, the plaintiffs and defendants, during the times they severally had it in charge. And even this was admissible only as tending to show that if Markel & Co. made the representations alleged as to their income from the business, they were guilty of deception. For this purpose it was proper; for if the house were as well kept, and all the other circumstances affecting the business, such as the running and stoppage of trains, amount of travel, etc., were as favorable when kept by the defendants in error as while it was in charge of Markel & Co., the inference would be that their respective incomes therefrom could not have differed materially. All things else being equal, if the average daily receipts of the former were only \$46.10, one would hesitate to believe that those of the latter were \$65, the amount they were charged with representing them to have been.

The charge to the jury on this subject, with a single exception which we shall hereafter notice, was right. The comparison as to the manner of keeping the house

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was limited, so far as it could be by an instruction, to the periods when it was run by these parties. But the objectionable comparison had been made in the face of objection, the testimony was before the jury, and it was of a character tending to prejudice Markel & Co. Under these circumstances we do not think the instruction should be held to cure the error in the admission of the evidence. The rule would probably be otherwise if this evidence had been admitted inadvertently, and, on objection, promptly withdrawn from the consideration of the jury.

The first of the instructions on which error is claimed by counsel in their brief is in these words: "In order to determine whether or not the said representations of defendants were or not false, if you find he made representations as alleged by plaintiffs, you may consider the evidence as to the manner the eating house was kept by the plaintiffs, and whether as good or better, or not as good as kept by defendants. If, from the evidence, you find it was as well kept by plaintiffs as by defendants the year then just past, or averagely well kept by the plaintiffs, and that plaintiffs were not able to receive from the business of the house more than \$46.10 per day, if such be true, it would be proper for you to consider this evidence in determining what the house had probably done per day during the past year." That is, while Markel & Co. had kept it.

This instruction is faulty in at least two particulars. *First*—In calling special attention to the comparison, "as to the manner the eating house was kept," and the daily receipts by the plaintiffs, as the particular evidence from which they might determine the receipts of Markel & Co. This matter of comparison was not the only evidence on this point. The witness, Nickles, who was superintendent of the house under Markel & Co., swore positively that the average daily receipts

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were from sixty to sixty-five dollars, and there was other testimony to the same effect. There were other things besides "the manner the eating house was kept" that might have seriously affected the receipts, among which may be mentioned, the season of the year, the amount of travel over the road, and the facilities afforded by the stoppage of trains for travellers to patronize the house. There was testimony on all of these points which ought not to have been thrown into the back-ground by omitting to mention it, and by giving undue prominence to testimony tending to prove that the comparatively meagre receipts were not owing to the manner in which plaintiffs kept the house.

The *second* objection we make to this instruction is to the clause, "or averagely well kept by the plaintiffs." Just what comparison was referred to by the use of this newly-coined word, "*averagely*," is not clear, but, whatever it may have been, it was not the proper standard for this case, wherein, as we have already shown, the only comparison permissible was that between the house as kept by the plaintiffs and by the defendants respectively.

The mode adopted by the court of arriving at the amount of damages, if any, caused by the misrepresentations complained of, was clearly erroneous. By the fifth instruction, the jury were told that "from the evidence of such representations, and other evidence in the case," they were to "determine what the value of the property would have been at the time of such sale to the plaintiffs if such representations had been true," which the court styled "*the value as represented*." This done, the jury were then to "determine the actual value of the eating house and property at the time of the sale to the plaintiffs, and then subtract the actual value so found from the value as represented as aforesaid, and the difference, or the excess of the value as

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represented, over and above such actual value, will be the amount of damages to be allowed the plaintiffs," etc.

There was nothing in the case, either in the pleadings or the evidence, to justify this instruction. No representations were made, or charged to have been made by Markel & Co., as to the actual value of the property sold, which consisted solely of the building, fixtures, and furniture, all particularly described in the written contract of sale. The representations complained of were of the business Markel & Co. had done in the house, and not as to the capacity of the house itself. The damages alleged to have been sustained were not in consequence of the want of sufficient capacity in the house to do all Markel & Co. represented they had done, but because of the want of adequate patronage. There was no such thing, therefore, for the jury to find as, "*the value as represented.*" But, even if there had been, it was not competent for them to ascertain it in the manner above indicated. The value of an article when in controversy must be ascertained from the testimony of witnesses competent to judge of it. It is a fact to be proved. Conceding, however, that Markel & Co. did exaggerate the income from their business, even to an extent far beyond what the defendants in error were able to realize under equally favorable circumstances, it would by no means necessarily follow that the consideration paid for the property used in the prosecution of that business exceeded its real value, and if it did not exceed it, then no damage which the law will recognize was done. We consider the rule of damages in a case like this to be simply the difference, if any, between the price paid for the property and its actual value at the time of the purchase. This would certainly be just, for if the purchaser paid no more than the property was worth, he

Markel v. Moudy.

sustained no damage in consequence of the alleged fraud.

The ninth instruction requested by the plaintiffs in error, and rejected by the court, ought to have been given. It was in these words: "The fact that the plaintiffs did not, and could not, make any net profits in operating said eating house during the time they so owned and operated it, does not of itself prove the representations of defendants, that they had prior to that time made larger profits, to be false."

This instruction not only stated the law correctly, but was peculiarly applicable to the testimony upon which the jury were to pass. The fact that the plaintiffs did not make any profits from the business was abundantly proved and not disputed. The other material facts on which they relied to make out their case were disputed, and might not be found. It was important, therefore, to Markel & Co. that the jury should be instructed to draw no unwarrantable conclusion from this conceded fact alone. In order to make the failure of the purchasers to realize the amount of profits they were led to expect of any consequence it was necessary to know all the circumstances, and they were many, affecting the business from which those profits were to come. In proving the alleged representations to have been made, it was necessary clearly to establish their falsity, which manifestly could not be done by merely proving that the plaintiffs had, perchance, failed to realize as much from the business as Markel & Co., by those representations, claimed to have done.

For these reasons, the judgment must be reversed and the cause remanded to the court below for a new trial.

REVERSED AND REMANDED.

Ex parte Two Calf.

EX PARTE TWO CALF, HORNED HORSE, TURNING BEAR,
BEAR MAN, BAD THUNDER, AND GREY DOG.

11	291
43	862
11	291
53	151
11	281
60	680

Practice in Criminal Cases: WITNESSES. Where the witnesses on the part of the state have not been prevented from attending court, and an indictment has not been found against a party accused of crime, at the term at which he is held to answer, he should be discharged.

ORIGINAL application for a writ of habeas corpus.

G. M. Lambertson, United States district attorney,
on behalf of the relators.

No appearance on behalf of the respondent.

BY THE COURT.

The relators are Indians, who were arrested by the military authorities of the United States and delivered to the sheriff of Cuming county for safe keeping. It appears that they are charged with committing the crime of murder in the unorganized territory of the state, and that the judge of the sixth judicial district designated Cuming county as the place wherein the alleged offense might be inquired into by the grand jury; that a regular term of the district court has been held in said county since their arrest and imprisonment, and no indictment has been found against them; that they have had no preliminary examination, and are not held by any warrant or commitment, and there is no evidence tending to show that they are guilty of any offense against the laws of the state. Section 389 of the criminal code provides that: Any person held in jail, charged with an indictable offense, shall be discharged if he be not indicted at the term of the court at which he is held to answer, unless such person shall

have been committed to jail on such charge after the rising and final report of the regular grand jury for said term, in which case the court, in its discretion, may discharge such person or order a new grand jury, as provided in section 405, or require such person to enter into a recognizance with sufficient security for his appearance before said court to answer such charge at the next term thereof; *Provided*, That such person so held in jail without indictment shall not be discharged if it appears to the satisfaction of the court that the witnesses on the part of the state have been enticed or kept away, or are detained and prevented from attending court by sickness or some inevitable accident.

There is no claim that the witnesses on the part of the state were prevented from attending before the grand jury, and it is apparent that the relators were arrested on mere suspicion. They must therefore be discharged.

JUDGMENT ACCORDINGLY.

11	223
48	821

HENRY CRESSWELL, APPELLANT, V. DAVID MCCAIG AND
OTHERS, APPELLEES.

1. **Trust: LAND HELD IN TRUST BY CHILD FOR PARENT.** In 1865 one M., at his father's request, came to this state and purchased 407 acres of land, for the sum of \$2,400, paying thereon \$1,000 of his father's money, but by consent taking the deed in his own name, and executing a mortgage on the land for the unpaid purchase money. Soon afterwards the father died, and the widow and her family removed on to the land in controversy, and have resided there ever since; but the legal title remained in M. until 1875, when he made deeds to those entitled to the same. In 1874 M. became surety for the payment of a large sum of money, upon which judgment was recovered in 1877, and an execution being returned unsatisfied, an action

Cresswell v. McCaig.

was instituted to subject the land in question to the payment of the judgment, *Held*, That M. held the land in trust and not as owner.

2. **Statute of Frauds.** The statute of frauds does not render a contract void, but voidable at the option of either party. But it does not require a party to ignore considerations of moral obligation, equity, and good faith by pleading the same; and a creditor cannot do so.
3. **Practice: SERVICE OF PROCESS BY BAILIFF.** A bailiff, unless specially appointed for that purpose, has no authority, as *bailiff*, to serve process issued out of the district court.

APPEAL from the district court for Cass county.
Tried below before POUND, J.

A. C. Ricketts and J. R. Webster, for appellants.

The contract, being by parol, falls within the statute of frauds. A payment by *cestui que trust* of a part of the purchase money does not relieve against the express provision of the statutes. G. S., chap. 25, § 3. *Bank v. McConiga*, 8 Neb., 245. Sugdon on Vendors, sec. 911. Brown on Stat. Frauds, sec. 93 (3d Ed.) 1 Perry on Trusts, sec. 135. *Holmes v. Holmes*, 44 Ill., 168. *Green v. Drummond*, 31 Md., 71. *Barnet v. Dougherty*, 8 Casey, 371. *Ring v. McClain*, 10 N. Y., 268. *Stutevant v. Stutevant*, 20 N. Y., 39. This is not a resulting trust. 1 Perry on Trusts, secs. 126, 133, 132, 137. *Hoehne v. Breitkeitz*, 5 Neb., 110. *Boyd v. McLean*, 1 Johns. Ch., 582. *Bottsford v. Burr*, 2 Johns. Ch., 409. *Malin v. Malin*, 1 Wend., 684. *Fort v. Calvin*, 3 Johns., 222. *Wallace v. Duffield*, 2 S. and R., 527. If the land was held by David McCaig in trust as a part of his father's estate, it should have been included in the inventory thereof. *Andrews v. Doolittle*, 11 Conn., 282. *Andrews v. Tucker*, 7 Pick., 250. *Bond v. Stevenson*, 58 Me., 499. *Matter of Buller*, 38 N. Y., 397. *Carrol v. Commett*, 2 J. J. Marsh, 195.

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Morrill v. Foster, 32 N. H., 379. *Tucker v. Ellis*, 24 Miss., 178. *Peterson v. Bank*, 82 N. Y., 21. *Roy v. McPherson*, 11 Neb., 197.

Sam. M. Chapman and *T. M. Marquett*, for appellees.

In this case the trust estate established by the sworn bill and the testimony of both the trustee and *cestui que trust*, does not fall within the statute of frauds, as claimed by counsel for plaintiff in error. Here the trust is a resulting one; the property was *wholly purchased* by and with the funds of John McCaig, Sr., under his supervision and direction, and *as soon as* purchased was taken possession of and occupied and improved by the widow and heirs of the said John McCaig, Sr., who continued in the quiet, peaceable, and notorious possession of the same from that date until the year 1875, when the heirs having attained their majority, a division of the estate was made, strictly within and in conformity with the trust reposed in David McCaig, the trustee. This trust could have been enforced at any time by the heirs of John McCaig, Sr., as against David, the trustee. In the case at bar the trustee, recognizing the trust, carried it out. The testimony establishes a sufficient consideration, and brings this case fully within the weight of authority. *Boyd v. McLean*, 1 Johns. Ch., 582. *Botsford v. Burr*, 2 Johns. Ch., 406. *Sug. on Vendors*, 414-419. *Hampson v. Fall*, 64 Ind., 382. *Crook v. U. S.*, 40 Mich., 599. 30 Gratt., 744. *Winkfield v. Brinkham*, 21 Kas., 682. *Brewer v. Mitchell*, 27 N. J. Eq., 54. *Stark v. Skarrs*, 6 Wall., 419. *Moody v. Arthur*, 16 Kan., 428.

MAXWELL, CH. J.

This is an action in the nature of a creditor's bill to subject 407 acres of land, formerly held in the name of

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David McCaig to the satisfaction of a judgment for the sum of \$6,000 and interest, in favor of the plaintiff and against the defendants, David McCaig and John McCaig.

The defense relied upon is: First, that the land in question never in fact belonged to David McCaig, but was a part of the estate of his father, John McCaig, Sr., and was held by David in trust for the heirs of said estate, who from the time of the purchase, in 1866, have resided continuously thereon, and have been in the quiet and peaceable possession of the same. Second, that the pretended judgment is a nullity, for want of jurisdiction in the court rendering the same. On the trial of the cause the court found the issues in favor of the defendants, and dismissed the action. The plaintiff appeals to this court.

It appears from the testimony that in the year 1865 the McCaigs were residents of Ogle county, Illinois, and that John McCaig, Sr., and Mary McCaig, defendant herein, were husband and wife and the parents of David, Daniel, William, Joseph, and Sarah McCaig; that David was the eldest son, and was largely entrusted by his father with the management of his affairs; that in September or October of that year, David, at his father's request, came to this state to select land for a home for his father, and purchased the land in question for the sum of \$2,400, paying at the time of the purchase \$1,000 of his father's money, but taking the deed for the premises in his own name, and executing a mortgage upon said real estate to secure the unpaid purchase money; that the reason why the deed was taken in his name instead of his father's was to enable him to execute a mortgage upon the lands in question without the delay incident to the transmission of an instrument to Illinois for execution, there being no communication

by railroad at that time; that this was the arrangement between him and his father, a deed for the lands to be made to his father as soon as he removed to this state; that in the spring of 1866, John McCaig, Sr., while preparing to remove on to the lands in question, died intestate; that a few days thereafter the widow and family came to this state, and have resided on this land from that time until the present. None of this land was included in the inventory of the estate of John McCaig, Sr. On the 28th of May, 1875, David McCaig conveyed 167 acres of this land to his mother, 80 acres to his sister, Sarah McCaig, and 80 acres each to his brothers, Daniel and Joseph McCaig. It also appears that when William and John became of age, they were paid their share in the estate, and took homesteads and settled upon them, and that David also had received his share. In September, 1874, David McCaig, as surety, signed two notes, each for the sum of \$2,500, due in thirteen months from date, in favor of the plaintiff, upon which judgment was afterwards recovered, and upon an execution being issued thereon and returned unsatisfied, this action was brought.

It also appears that the debt was contracted by the state grange prior to that time, and that no part of it was contracted on the credit of David McCaig, and that he was induced to sign the notes in question upon the representations of Otis (a partner of the plaintiff), that "you will not lose a dollar by signing this; there is enough stuff here, if taken care of and not levied upon, to make all our indebtedness. You will not lose a dollar by signing the note." And he denies the testimony of Otis, that he represented to him that he owned any portion of the land in dispute. Upon this testimony we are asked to subject this real estate to the payment of the judgment. The testimony of the defend-

Cresswell v. McCaig.

ants is clear and consistent, and carries with it an air of probability, which convinces us of its truthfulness. This was a family arrangement, and when not made for the purpose of hindering, delaying, and defrauding creditors, and is satisfactory to those entering into it, their motives will not be enquired into. The primary question is, to whom did the real estate in question actually belong at the time the deeds in question were made? Suppose that in the year 1865 David McCaig had purchased this land with his own money and taken a deed therefor in his own name, and thereafter should have sold the same by a parol contract to his mother, brothers, and sister, payments to be made from time to time till 1875, and upon the completion of the same he should convey said premises by deed, could subsequent creditors assail such sale and have the deed set aside because the contract was void? And if they could not, can they assail a trust which, whatever its character, was not designed to hinder, delay, or defraud creditors, and the trust having been fully executed? This is not an action to enforce a trust; if so, the authorities cited by the appellant would be applicable. The object is to have it declared void, and that the parties receiving deeds are not beneficiaries under the same. The statute of frauds does not make parol contracts void, but voidable at the option of either party by withholding a right of action thereon, but does not require either party to ignore considerations of moral obligation, equity, and good faith, by pleading the same, and certainly a creditor cannot do so. *Cahill v. Bigelow*, 18 Pick., 369. *Lefferson v. Dallas*, 20 Ohio St., 74. *Muis v. Morse*, 15 Ohio, 568. That this property belonged to the estate of John McCaig, Sr., is clearly established by the testimony, and the widow and children were as much entitled to the same as though they had purchased and paid for it. The mode of dividing the

property is not before the court, and whether just or unjust was satisfactory to them, and will not be enquired into in this action. The omission to inventory this property as a part of the estate is of no consequence. The plaintiff was not a creditor of the estate, and has no cause of complaint on that ground. It is very clear that David McCaig, at the time he signed the notes in question, was not the owner of this land, but had the mere naked legal title to the same. The judgment of the district court must therefore be affirmed.

As to the jurisdiction of the court, there was no appearance in the action, and the court, if it acquired jurisdiction, did so by the service of a summons. The return on the summons is as follows: "I received this writ at 9 o'clock A.M., on the 5th day of June, A.D. 1877, and as commanded thereby I summoned the within named David McCaig, John McCaig, (William McCaig not found in Cass county, Neb.) on the 6th day of June, A.D. 1877, in Cass county, Neb., by leaving at the residence of David McCaig and John McCaig a true and certified copy of this summons, with all the endorsements thereon.

"M. B. CUTLER, Sheriff of Cass Co., Neb.

"By WM. GILMORE, Bailiff."

A bailiff, unless specially appointed for the purpose, has no authority to serve process issued out of the district court, and if it clearly appeared that the service was made by him as *bailiff*, it would be null and void. There is testimony, however, tending to prove that he was deputy sheriff at or about the time designated, and the court below found the service to be sufficient, and we are unable to say that this finding is incorrect, although the evidence may not fully satisfy our minds upon that point. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

EMERSON EATON, PLAINTIFF IN ERROR, V. THE BOARD OF
COUNTY COMMISSIONERS OF CASS COUNTY, DEFENDANT
IN ERROR.

11	229
11	359
11	229
56	815

Counties: LIABILITY FOR ACTS OF TREASURER. A county is not liable for money collected by a county treasurer for the redemption of lands sold for delinquent taxes. Such moneys are to be held by the treasurer, subject to the order of the purchaser, his agent, or attorney.

ERROR from the district court for Cass county. Tried below before POUND, J.

J. H. Fownworthy, for plaintiff in error, contended that the county treasurer was the agent of the county, and as such received the moneys sued for, because the act of receiving the "redemption money" is provided by law. G. S., 922, § 64.

George W. Covell and *George S. Smith*, for defendant in error. The county is not liable. *Onderdonk v. Brooklyn*, 81 Barb., 505.

MAXWELL, CH. J.

This is an action to recover the sum of \$1256.82, alleged to be due the plaintiff from the defendant, for money paid to the treasurer of Cass county during the years 1869, 1870, 1871, and 1872, for the redemption of lands sold to the plaintiff for delinquent taxes. The claim was presented to the board of county commissioners in the year 1877, and rejected. The plaintiff appealed to the district court, where the order of the board of county commissioners was affirmed and the action dismissed. He now brings the cause into this court by petition in error.

Section 68 of the revenue law of 1866 provided that

the owner or occupant of any land sold for taxes, or any other person, may redeem the same at any time within two years after the day of such sale, by paying to the county treasurer for the purchaser, his heirs, or assigns, the sum mentioned in his certificates, and interest thereon at forty per cent per annum from the date of purchase, together with all other taxes subsequently paid, whether for any year or years previous or subsequent to such sale, and interest thereon at the same rate from the date of such payment; and the treasurer shall enter a memorandum of the redemption in the list of sales, and give receipt therefor to the person redeeming the same, and file a duplicate of the same with the county clerk as in other cases, and hold the money paid to the order of the purchaser, his agent, or attorney. Rev. Stat., page 829.

In 1869 this section was somewhat modified, omitting that portion requiring a copy of the certificate of redemption to be filed with the county clerk. The treasurer is to hold the money subject to the order of the purchaser, his agent, or attorney. Undoubtedly, if at the expiration of his term of office the treasurer should deliver the same to his successor, and such funds should thus be placed in the county treasury, justice would require their payment to the parties entitled thereto. But in this case there is no evidence whatever that any portion of the amount claimed was paid into the county treasury, and there is therefore an entire failure of proof to sustain the petition. The statement of the plaintiff that he was not aware that this large sum of money had been paid to the treasurer receiving the same until several years afterwards, although a resident of the same town, seems highly improbable. In any event, the mere want of knowledge upon his part, there being no concealment by the defendant, does not prevent the running of the

 Eaton v. Carruth.

statute of limitations in a proper case. Angell on Limitations, sec. 187. *Wood v. Carpenter*, Sup. Court U. S. 14 West Jurist, 70. It is unnecessary, however, to pass upon that question. The judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

SARAH M. EATON, PLAINTIFF IN ERROR, V. FRANK
CARRUTH, DEFENDANT IN ERROR.

1. **Bill of Exceptions.** Instructions of the court to the jury, a motion for a new trial, and all matters required by the statutes to be filed with the clerk and entered upon the journal of the court, should not be embodied in a bill of exceptions.
2. **Practice: INSTRUCTIONS TO JURY.** An instruction which in effect withdraws a case from the jury, cannot be sustained where there is testimony that should be submitted to them.

ERROR from the district court for Cass county. Tried below before POUND, J.

J. H. Foxworthy, for plaintiff in error.

Instruction No. 2 (recited in the opinion) takes from the jury the right to find whether there had been a delivery of the property to the plaintiff. *Meredith v. Kennard*, 1 Neb., 819. *Meyer v. M. P. R. R. Co.*, 2 id., 388. *Billings v. McCoy*, 5 id., 191. *Hail Ins. Co. v. Wilde*, 8 id., 481. *Gillet v. Corum*, 5 Kans., 612. *Price v. Mahony*, 24 Ia., 582. *Olive v. State*, ante p. 1.

Smith & Strobe, for defendant in error, stating that there being evidence to show that plaintiff exercised no acts of ownership over the building, and that the

11	231
29	322
11	231
30	556
11	231
44	876
11	231
59	700

conveyance was void as to defendant's grantee, a creditor of plaintiff's grantor, cited *Crumbaugh v. Kugler*, 2 Ohio St., 373. *Amick v. Young*, 69 Ill., 542. *Crawford v. Kirksey*, 55 Ala., 282. *Wake v. Griffin*, 9 Neb., 47. *Hunt v. Spencer*, 20 Kans., 126. *Purkett v. Polack*, 17 Cal., 382. *Potter v. McDowell*, 31 Mo., 69.

MAXWELL, CH. J.

Before proceeding to the consideration of this case I will call attention to the condition of the record. First in order is the petition and precipe, filed April 20, 1878. Second, a copy of the summons dated April 20, 1878. Third, an amended petition filed May 24, 1878. Fourth, a demurrer to the amended petition, filed November 11, 1878. Fifth, a motion to strike the demurrer from the files, upon which there was no ruling of the court. Sixth, a demurrer to the petition, upon which there was no ruling. Seventh, an answer filed April 23, 1879. Eighth, a demurrer to the answer filed May 1st, 1879, upon which no ruling seems to have been had. Ninth, the reply filed Sept. 18, 1879. We then have the entries of continuances from the commencement of the action upon which no point is raised. The issue is made by the amended petition, answer, and reply. No question is raised on the original petition, summons, motions, demurrers, or continuances, and they should be omitted from the record as needlessly cumbering it and entailing unnecessary expense. In addition to the above, the motion for a new trial is certified by the clerk and is twice copied into the bill of exceptions. The instructions are certified by the clerk and are also embodied in the bill of exceptions. The verdict of the jury is copied into the exceptions and is also certified by the clerk. The object of a bill of exceptions is to bring into the record matter which is not otherwise properly a part of it.

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Ray v. Mason, 6 Neb., 101. *Credit Foncier of America v. Rogers*, 8 Id., 34. *Aultman v. Howe*, 10 Id., 10. But any matter which is required by the statute to be filed with the clerk and entered at length upon the journal of the court need not be preserved in a bill of exceptions, and should not be incorporated into the same, as it is properly a matter of record, and may be certified by the clerk. *Morrow v. Sullender*, 4 Neb., 375. The instructions, motion for a new trial, and verdict of the jury are properly matters of record in this state, and should not be embodied in a bill of exceptions. And where there is a repetition or irrelevant matter copied into a record, the costs of the same, if the proper motion is filed, will be taxed to the party at fault.

The action is brought for the conversion of a frame building situate on lot one in block thirty-five, in the city of Plattsmouth. The answer of the defendant: *First*. Denies that he converted said property to his own use. *Second*. Alleges that the treasurer of Plattsmouth seized the same as personal property to satisfy certain delinquent taxes due from E. H. Eaton, for the years 1869, 1870, 1871, and 1872, amounting to the sum of \$608.00, and on the 23d day of February, 1876, sold the same to the defendant for the sum of \$245, and applied the proceeds of said sale on said delinquent taxes, etc. It is also alleged that E. H. Eaton, to "evade the payment of his just debts, falsely, wrongfully, and unlawfully procured this plaintiff to claim ownership of said property," etc.

The reply denies "each and every allegation of new matter" contained in the answer, and specially denies that E. H. Eaton was indebted to the city of Plattsmouth in the sum of \$608.00 for taxes due said city for the years 1869, 1870, 1871, and 1872, as alleged in the answer, or in any sum whatever.

Eaton v. Carruth.

On the trial of the cause, a verdict was returned in favor of the defendant, upon which judgment was rendered. The plaintiff brings the cause into this court by petition in error.

The principal error relied upon is the second instruction, which is as follows: "In order to make a gift of personal property valid, there must be a delivery either actual or symbolical, depending on the character and situation of the property which is the subject of the gift. And in this case it was not sufficient to make the gift valid that the plaintiff's husband made and delivered to plaintiff the paper writing, which has been introduced in evidence, whereby the husband purports to give the said property to the plaintiff, but there must have been a delivery of the property or some act of ownership exercised over it by the plaintiff."

The plaintiff claims title to the property in question under the following document: "To Mrs. S. M. Eaton, greeting: Centennial New Year's gift, Plattsmouth, January 1st, 1876. Happy New Year. Compliments of E. H. Eaton to S. M. Eaton. I hereby give and bequeath all title and interest in store house on lot No. 1, B 35, on Main street, of Plattsmouth. As witness my hand January 1, 1876.

"E. H. EATON."

"Said building is now occupied by lease to M. J. Mateer for three months from January 1, to April 1, 1876, at \$25.00 per month, payable monthly in advance. Said building stands on leased ground subject to ground rent. January 1, 1876.

"E. H. EATON."

Some objection is made to the form of the words "give and bequeath" as denoting a gift by will, but this objection is not strenuously insisted upon, and construing the entire instrument together there is no

 Stubendorf v. Sonnenschein.

doubt that it was intended as a gift *in præsentis*. And particularly is this evident when it is read by the light of the testimony in the case.

The testimony on the part of the plaintiff tends to prove that the gift was made about the 1st of February, 1876, and that the property then became the plaintiff's, and that E. H. Eaton collected the rent for the use of the plaintiff from the date of the alleged gift until the sale of the property to the defendant. This testimony the court entirely disregarded, and by its instructions virtually withdrew the case from the jury. In this there was error. The defendant has entirely failed to show by legitimate testimony that any taxes were due from Eaton to the city of Plattsburgh, or that the property in question was sold under lawful authority. By the issue made in the pleadings, the onus is upon him to prove those facts. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STUBENDORF AND COMPANY, PLAINTIFFS IN ERROR, V.
 FRED. SONNENSCHN AND W. E. KRAUSE, DEFEND-
 ANTS IN ERROR.

11	235
48	901
11	235
52	659

1. **Pleading: PETITION.** A petition which states that certain goods were sold and delivered by the plaintiffs to the defendants, sets forth a copy of the account, alleges that there are no credits thereon and no part thereof has been paid, and that there is due from the defendants to the plaintiffs a definite sum, is not subject to demurrer as not stating a cause of action.
2. ———: ———. The code makes the title of the cause a part of the petition, and renders it unnecessary to repeat the names of the parties in the body of the petition, it being sufficient to describe them therein as "the plaintiff" or "the defendant."

ERROR from the district court of Cuming county.
Heard below by BARNES, J.

J. C. Crawford, for plaintiff in error. The title of a case is as much a part of the petition as any other part. Code, sec. 89. Moreover, this is a suit not against the partnership but the individual members. *Smith v. Gregg*, 9 Neb., 213.

M. McLaughlin, for defendant in error, filed no brief.

MAXWELL, CH. J.

In September, 1880, the plaintiffs filed their petition against the defendants in the district court of Cuming county, to recover the sum of \$109.60 upon an account. The defendants demurred to the petition upon the ground that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was sustained, and the action dismissed, to which the plaintiffs excepted, and now assign the same for error. The following is a copy of the petition :

“Stubendorf & Co.,
a firm doing business in
the State of Nebraska,
not incorporated,
Plaintiffs,

v.

Fred. Sonneschine and W.
E. Krause, late co-part-
ners trading under the
name and firm of Fred.
Sonneschine,
Defendants.

The plaintiffs say:

1. Their cause of action is founded upon an account for goods and merchandise sold and delivered by the plaintiffs to the defendants at Omaha, Nebraska, at their special instance and request. A copy of said account is hereto attached, marked Exhibit A, and made a part of the petition.

2. There are no credits thereon, and no part thereof has been paid.

3. There is due the plaintiffs from the defendants, on said account, the sum of \$109.60, with interest at legal rate from September 9th, 1879. Wherefore plaintiffs pray judgment against the defendants for the sum of \$109.60, with lawful interest thereon from September 9th, 1879." A copy of the account is attached to the petition.

Section 129 of the code of civil procedure provides that "in an action, counter-claim, or set-off, founded upon an account, promissory note, bill of exchange, or other instrument for the unconditional payment of money only, it shall be sufficient for the party to give a copy of the account, with all credits and endorsements thereon, and to state that there is due to him on such account or instrument, from the adverse party, a specified sum, which he claims with interest," etc. Gen. Stat., 544.

The petition alleges the sale and delivery of the goods described by the plaintiffs, to the defendants, at the times set forth in the account, sets forth a copy of the account, and alleges that there is due from the defendants to the plaintiffs a definite sum. This is sufficient, under the section above quoted, to entitle the plaintiffs to recover. The defendant Krause, after filing a demurrer jointly with his co-partner, Sonnenschine, filed a separate demurrer, upon the ground that the facts stated in the petition

were not sufficient to show a cause of action against him.

The action is brought against Fred. Sonneschine and W. E. Krause, partners, etc. This description occurs only in the title of the petition, as in the body of the same they are styled merely defendants.

Section 92 of the code provides that "the petition must contain: *First*, the name of the court and county in which the action is brought and the names of the parties plaintiff and defendant," etc. Gen. Stat., 539. Judge Bliss, in his valuable work on Code Pleading, sec. 145, says: "The full names of both plaintiffs and defendants—not, as formerly, by describing them in the body of the pleading, but in the form of a title to the cause; and they may thereafter be referred to, without naming them, as 'the plaintiff' or 'the defendant.'" This, in our opinion, is a correct view of the law; and it is unnecessary to repeat the names in the body of the petition, but they may be described therein as plaintiff or defendant. It follows that the judgment of the district court must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

11	238
36	206

11	236
55	667

THE STATE OF NEBRASKA, EX REL. ELIZABETH BERGER,
v. HORACE B. SMITH.

1. **Practice in County Courts.** Section 1001 of the code of civil procedure, relative to justices of the peace, is applicable to the practice in county courts, in all cases, regardless of the amount in controversy.
2. ———: **SETTING ASIDE OF JUDGMENT.** A judgment rendered by a county court, in the absence of the defendant, may be set aside under the provisions of the above section of the code.

ORIGINAL application for writ of mandamus.

C. A. Baldwin, for relator.

H. D. Estabrook, for respondent.

LAKE, J.

This is an application for a writ of mandamus to compel the defendant, as county judge, to issue an execution on a judgment rendered in the county court at the December term, 1880, in favor of the relator for the sum of \$500 and costs, in the absence of the defendant in the action, which judgment was subsequently set aside on his motion, under sec. 1,001 of the code of civil procedure. Gen. Stat., 685.

The question thus raised is one of practice. It is, whether this section, which is found in that part of the code governing procedure before justices of the peace, is applicable also to the practice in county courts in what are known as term cases, or those wherein the amount in controversy is above the jurisdiction of a justice of the peace. The question is essentially one of power in the county judge to set aside the judgment in this particular case, and not whether such power was wisely exercised.

Similar questions were presented in *Banks v. Uhl*, 6 Neb., 145, and in *Cox v. Tyler*, Id., 297, and our decision in those cases is decisive of this one. In the former the question was whether, in the probate court, of which our present county court is the successor, a plaintiff could voluntarily dismiss his action, as provided in the justice act, and we held that he could. We there said: "As to the dismissal of actions there is no provision whatever in the act concerning probate courts, but in the second section of that act it is pro-

vided that the provisions of the code of civil procedure relative to justices of the peace shall, where no special provision is made in this subdivision, apply to the proceedings in all civil actions prosecuted before said probate judges." Then, referring to the act relative to justices of the peace, we showed that the authority for such voluntary dismissal was given in express words.

And in the latter case of *Cox v. Tyler*, where the question was whether the county court could vacate its judgment and *grant a new trial*, it was held that the only authority for such a step, in that court, must be looked for in the act relative to justices of the peace. After quoting the words of the statute above given, we there say: "It will be noticed that this section extends not alone to cases in which a justice of the peace would have jurisdiction, but to '*all civil actions prosecuted before said probate judges*,' and consequently as no provision is made '*in this subdivision*,' * * * we must resort to '*the code of civil procedure relative to justices of the peace*' for direction in this matter."

The rule of construction applied by us in the two cases above referred to is decisive of this one. In the act or acts relative to probate or county courts, nothing is said as to the vacating of judgments, but there is in the act concerning justices of the peace. In the section first above referred to, it is provided that: "When judgment shall have been rendered against a defendant in his absence, the same may be set aside upon the following conditions." Then follow three conditions upon which the judgment may be vacated, and the defendant heard in his defense. This section is applicable to the practice in county courts, in all cases, regardless of the amount in controversy.

WRIT DENIED.

McCann v. Merriam.

MARIA T. McCANN, APPELLEE, v. SELDEN N. MERRIAM,
APPELLANT.

11	241
11	511
16	201
11	241
59	428

1. **Land Road Tax.** Under the constitution of 1876, a land road tax levied without regard to valuation, and at the rate of four dollars per quarter section, is void.
2. ———: **TAX SALE.** A sale of land for the taxes of 1876 was made in March, 1878, under the revenue act of Feb. 15th, 1869. The deed to the purchaser was made by the treasurer in March, 1880, according to the provisions of the revenue act of 1879. *Held*, That the force of the tax deed and the validity of the sale were to be tested by the act in force when the sale was made. And, *held further*, that including a void tax in the amount for which the land was sold was sufficient to avoid the deed.

APPEAL from a decree entered in the district court of Otoe county, rendered by POUND, J., sustaining an action by appellee to cancel a tax deed issued according to the form and pursuant to the laws of 1879, (pp. 327, 333), for the taxes of 1876, including among others a road tax of four dollars per quarter section.

E. F. Warren, for appellant. Even if the road tax was illegal, it could not defeat the tax deed or render the sale invalid. Laws 1879, sec. 142, p. 334. To defeat the tax title, it should have been shown either that the property was not subject to taxation for the year or years named in the deed; that the taxes had been paid before the sale; that the property had been redeemed from sale according to law; or that there had been an entire omission to list or assess the property, or to levy the taxes, or to sell the property. Laws 1879, sec. 130, p. 329. The legislature had power to enact the law of 1879. *Pillan v. Roberts*, 13 How., 472. *Williams v. Kirtland*, 13 Wal., 306. *Orano v. Veazie*, 57 Me., 517. *Johnson v. Elwood*, 53 N. Y., 435. *Cook v. Hackelman*, 45 Mo., 317. *Hoffman v. Bell*, 61 Pa. St.,

444. *Whitney v. Marshall*, 17 Wis., 174. *Wright v. Dunham*, 13 Mich., 414. *Stanberry v. Sillon*, 13 Ohio St., 571. *Rima v. Cowan*, 81 Ia., 125. *Clark v. Thompson*, 37 Ia., 536. *Cooley on Tax*, pp. 455, 356, and notes.

M. L. Hayward, for appellee. Tax deeds are governed by the laws in force at the time of sale. *Nelson v. Roundtree*, 23 Wis., 369. *Smith v. Cleveland*, 17 Wis., 556. *State v. Mantz*, 62 Mo., 258. Where a tax or a portion is originally void, the legislature cannot breathe vitality into it. *Cooley on Taxation*, 227, 243. *Dean v. Charlton*, 23 Wis., 590. *Silsbee v. Stockle*, 7 N. W. Rep., 160. *Abbott v. Lindenbower*, 42 Mo., 162.

LAKE, J.

It was proved on the trial, and the fact is conceded by counsel for the appellant, that in the amount for which the land was sold by the treasurer there was included a road tax for the year 1876, levied without regard to valuation and at the arbitrary rate of four dollars per quarter section. As we have heretofore held, such a levy, under the constitution of 1875, is void. *Dundy v. Richardson County*, 8 Neb., 508. It is contended, however, on this point, that notwithstanding the inclusion of this void tax, inasmuch as the deed was made under and in pursuance of the revenue act of 1879, its force is not to be at all impaired on that ground.

This, we think, is claiming more for this act than is warranted by its terms. In sec. 129 the six preceding sections are specially mentioned as being applicable to sales theretofore made. *Comp. Stat.*, 424. This special reference to these six sections precludes the idea that other portions of the act should have such application. This, without more, would leave the force of the tax deed and validity of the sale to be tested by the act in force when the sale was made—that of Feb.

Doolittle v. Marsh.

15th, 1869. Whatever the rule may be under the present act, we have no doubt that under that of 1869 such total invalidity of the tax, or a portion thereof, may be shown to avoid the deed, and thus defeat the title of the purchaser at tax sale. We see nothing in the record which calls for any change in the judgment, and it is affirmed.

JUDGMENT AFFIRMED.

MARY J. DOOLITTLE, PLAINTIFF IN ERROR, v. WILLIAM W. MARSH, DEFENDANT IN ERROR.

Corporations. The *debts* referred to in sections 186 and 189 of the chapter of the General Statutes, entitled Corporations, are debts arising upon contracts, express or implied, and not damages for torts.

ERROR to the district court for Douglas county. The plaintiff in error obtained a judgment against the Omaha Horse Railway Company, for damages for personal injuries sustained by her while a passenger upon one of the cars of the company, caused, as alleged, by the negligence of the driver of the car. Failing to collect the judgment of the company, after the return of execution against the company, she brought her action against the defendant in error, a stockholder of the horse railway company, to enforce a supposed personal liability on his part, created by section 186 of the chapter of the General Statutes on Corporations. A general demurrer was interposed to the petition, which was sustained by the district court, SAVAGE, J., presiding, and judgment rendered for the defendant, to reverse which this petition in error is brought.

11	243
29	486
11	942
30	800
11	243
56	204

Redick & Connell, for plaintiff in error, cited *Smith v. Steele*, 8 Neb., 115.

George E. Pritchett, for defendant in error. Debts do not include damages for torts. 3 Black. Com., 154. *Heacock v. Sherman*, 14 Wend., 58. *Bohn v. Brown*, 33 Mich., 257. *Cable v. McCune*, 26 Mo., 371.

COBB, J.

I cannot agree with counsel for the defendant in error in the first point made in his able argument, in which he contends that section 136 of the chapter of the General Statutes entitled "Corporations," does not apply to any corporation not created under general laws. I agree that its provisions are limited to corporations thereafter created, but that is the only limitation, and the only doubt is whether section 139 does not extend the same provision to all corporations without reference to the date, as the two sections combined certainly do, without regard to the method of their organization.

But upon his second, or as counsel has it numbered in his brief, the fourth, point, I am quite inclined to agree with him. The *debts* spoken of in the two sections undoubtedly are only those obligations arising on express and implied contracts growing out of dealings between the corporation and other corporations or individuals where the financial condition of such corporation would or might be the foundation of credit. The law has made it one of the conditions upon which the promoters and managers of corporations may do business without risk to their private fortunes, that such corporation shall publish annually a true statement "of the amount of all the existing debts of the corporation." The only useful end which such statement can serve, is to furnish persons about to give

 VanDeuzer v. Peacock.

such corporation credit a basis of information for their guidance. The tangible personal property of the corporation shows for itself, its real estate can be learned from the records, but in order to be enabled to properly rate its credit, one must know the amount of its debts. Persons about to deal with others, be they corporations or natural persons, usually resort to all convenient sources for information as to their credit. But it is quite unheard of for a person about to become a passenger on a street railroad or other railroad, stage coach, or steamboat, or guest at an hotel, to stop to enquire whether the owners were able to respond in damages in case of the death, maiming, or robbery of such passenger or guest, by reason of the negligence of the servants of such owners. Hence I conclude that the notice required by statute was not intended for the benefit of claimants for unliquidated damages, and that they can take no advantage of its non-publication.

It necessarily follows from the above that there was no error on the part of the district court in sustaining the demurrer, and that its judgment in this case must be affirmed.

JUDGMENT AFFIRMED.

J. VANDEUZER, APPELLANT, v. EDWARD PEACOCK AND
OTHERS, APPELLEES.

11	245
15	435
11	245
32	644

Husband and Wife. A contract between husband and wife made in good faith, upon an adequate consideration, and not for the purpose of hindering, delaying, or defrauding creditors of the husband, will not be declared fraudulent from the mere fact that years afterwards the husband was unable to pay his debts.

APPEAL from the district court of Johnson county.
Heard below by WEAVER, J.

VanDeuzer v. Peacock.

T. Appleget & Son, for appellant. The pretended contract between Peacock and his wife being at most a verbal one, is of no force against creditors. *Reade v. Livingston*, 3 Johns. Ch., 483. *Siddle v. Needham*, Sup. Ct., Mich. The deed to Mrs. Starrett was made after the death of Mrs. Peacock, and upon the death of the wife, Peacock's interest by curtesy was liable for his debts, and a conveyance of it was void as to creditors. *Reade v. Livingston*, *supra*. *Bayard v. Hoffman*, 4 Johns. Ch., 450.

S. P. Davidson, for appellee, cited, to uphold the *bona fides* of the conveyance, *Patrick v. Patrick*, 77 Ill., 555. *Phillips v. North*, Id., 246. *Sweeney v. Damron*, 47 Id., 450. *Hovey v. Holcomb*, 11 Id., 660. *Gridley v. Watson*, 53 Id., 186. *Moritz v. Hoffman*, 35 Id., 554. The agreement, if verbal and uncertain, was consummated.

MAXWELL, CH. J.

This is an action in the nature of a creditor's bill. The petition alleges in substance that at the April, 1879, term of the district court of Johnson county, the plaintiff recovered a judgment against Edward Peacock for the sum of \$691.00, and \$9.31 costs of suit, which judgment still remains in full force and effect; that an execution was thereafter issued on said judgment, which on the — day of August, 1879, was returned wholly unsatisfied; that said Edward Peacock is insolvent; that after said Peacock contracted the debt upon which said judgment was recovered he became the owner of the north-west quarter of section 6, town 5 north, of range 11 east, and also the south-west quarter of section 20, town 4 north, of range 10 east, all in Johnson county, Nebraska; that on or about the 18th day of March, said defendant made an exchange of the north-west quarter of section 6, town

VanDeuzer v. Peacock.

5, range 11, with one Mary Starrett, for the north-west quarter of section 29, town 4, range 10, and caused said land to be conveyed to William F. Peacock and Mary Peacock, minor children of said Peacock, without consideration, and with the intent to hinder and delay the creditors of Edward Peacock, etc.

Answers were filed by the defendants, to which it is unnecessary to refer. On the trial of the case the court found for the defendants and dismissed the action. The plaintiff appeals to this court.

It appears from the testimony that the defendant, Edward Peacock, in the year 1876, traded a farm owned by himself in Ford county, Illinois, which was heavily incumbered, to one John Yeoman, a resident of Indiana, for the two quarter sections of land first above described; that in November of that year, Peacock induced his wife to apply to her father for pecuniary aid, promising her if she obtained the same to convey one half of the land received from Yeoman to her; that thereupon she applied to her father, Henry F. Truelock, of Warren county, Illinois, for "one thousand dollars to finish paying for the land in Nebraska." His testimony on that point is as follows: "I told her that if she and her husband, Edward Peacock, would deed one quarter section of the land mentioned either to me or have it deeded to her, I would let her have some money, but could not let her have the amount she asked for. She said that she and her husband had agreed before she left home that if I would let them have some money, they would secure it by mortgage on the land or have the land deeded to her. I told her that if she took the deed in her own name I would be satisfied, and would let her have the money. With that understanding, accordingly, on November 13th, 1876, I went to the Union Bank, of Abingdon, Illinois, and bought a draft for \$500.00 and sent it to

Edward Peacock," etc. The cashier of the bank also testified to the amount of the draft and in whose favor it was drawn. None of the land was conveyed to Mrs. Peacock, nor was any mortgage given to secure the money furnished by her father. In October, 1877, Mrs. Peacock died. Prior to her death she called the attention of her husband to the fact that no deed had been made to her for the lands in question, and requested him to have the same made to William F. and Mary E. Peacock, their infant children.

A few days after the death of Mrs. Peacock, her father called upon Edward Peacock, and was then informed by him that the land in question had not been conveyed to her, and Peacock then promised him to trade the land intended to be conveyed to his wife for land adjoining his own, and have the deed made to the children of Mrs. Peacock, which was afterwards done. The note upon which the judgment was recovered, was given in renewal of a note given by William Peacock, the defendant being merely a surety thereon. The renewal note was given a short time before Peacock traded the Ford county land to Yeoman. Upon this testimony we are asked to hold that the conveyance from Peacock to Starrett, and from Starrett to the children of Mrs. Peacock, is fraudulent and void as to creditors.

This is not a case where the husband was permitted to retain his wife's property and contract debts upon the belief that he was the owner of the same. In such cases this court has held that the equity of the creditor was superior to that of the wife. *Aultman v. Obermeyer*, 6 Neb., 260. *Roy v. McPherson*, ante p. 197. The debt was not contracted upon the faith of this property, nor had the husband received the money from his father-in-law at the time the debt was contracted. That this money was actually furnished by Truelock,

VanDeuzer v. Peacock.

and upon the promise that a mortgage was to be given for its security, or one half of the land conveyed to the wife of Peacock, there is no question. And that he could have insisted upon the performance of this agreement will not be denied. There is no testimony in the record showing the value of this land or that it was worth to exceed \$500.00.

The ground upon which relief is sought in the petition is that there was no consideration for the conveyance from Peacock to Starrett, and from Starrett to the children of Mrs. Peacock. If it appeared from the testimony that such was the case, the land in question would be subject to the payment of the plaintiff's judgment. But in our opinion a sufficient consideration is shown. The fact that the money obtained from Truelock was not used in the payment of the land, but presumably in making improvements thereon, does not render the transaction void. The agreement has been consummated and derives its validity from the money actually furnished by the wife's father for her benefit, and the adequacy of consideration. A contract between husband and wife made in good faith upon an adequate consideration, and not with the intent to hinder, delay, or defraud creditors of the husband, will not be declared fraudulent from the mere fact that years afterwards the husband was unable to pay his debts.

After a very careful examination of the entire testimony in the case, we are of the opinion that the judgment of the court below is right, and it is affirmed.

JUDGMENT AFFIRMED.

11	250
17	523
18	129
11	250
30	407
11	250
52	497
55	573

SAMUEL P. DAVIDSON, PLAINTIFF IN ERROR, v. JOHN A.
COX, DEFENDANT IN ERROR.

Real Property: MORTGAGE: COVENANT. In this state, a mortgage of real estate is a mere pledge or collateral security creating a lien upon the mortgaged property, but conveying no title nor vesting any estate, either before or after condition broken. The covenants running with the land therefore do not pass to the mortgagee as assignee.

RE-HEARING of the case reported in 10 Neb., 150, where it is stated at length.

Davidson & Easterday, for plaintiff in error. A mortgagee, under a mortgage containing covenants of warranty, so far as is necessary to protect his interest, is entitled to the benefits of the covenants as completely as a grantee under a deed containing such covenants. Rawle on Covenants, pp. 26, 27, 29, 32, 344, 346. 2 Wash. Real Prop., 159. *White v. Whitney*, 3 Met., 81. *Harper v. Perry*, 28 Ia., 58. *Lockwood v. Sturdevant*, 6 Conn., 378. *Wright v. Sperry*, 21 Wis., 334. *Lloyd v. Quimby*, 5 Ohio St., 262.

B. F. Perkins, for defendant in error. The covenant of warranty relates only to the condition of the title. A mortgage conveys no title, vests no estate, but is a mere pledge or security. *Hurley v. Estes*, 6 Neb., 386.

MAXWELL, CH. J.

This is an action by a junior mortgagee upon a covenant of warranty in the deed of the grantor of the mortgagor. The plaintiff alleges in his petition that on the twenty-first day of April, 1876, the defendant conveyed to one Elizabeth L. Richards, the north-east

quarter of the north-east quarter of section 5, in township No. 6 north, of range 10 east, by warranty deed; that by said deed the defendant covenanted with said Richards that he held said premises by good and lawful title; that he had good right and lawful authority to sell the same, and that they were clear and free from all liens and incumbrances whatsoever; and further covenanted to warrant and defend the same against the lawful claims of all persons whomsoever; that on the twenty-first day of April, 1876, Richards mortgaged said premises to the plaintiff to secure the sum of \$40, with interest, which mortgage was duly recorded; that said mortgage contained covenants of general warranty; that notwithstanding the covenants in said deed and mortgage, there existed prior to the twenty-first of April, 1876, certain mortgages on said premises to P. D. Cheney and others, which were foreclosed on the sixteenth day of October, 1877, and said premises ordered sold; that under said decree said premises were sold, and the sale thereof confirmed, but the proceeds of said sale were applied exclusively to the payment of said senior mortgages, and that the whole amount due the plaintiff on the mortgage from Mrs. Richards is unpaid, and that she is insolvent. It is also alleged that the purchaser is in possession of the premises in question. No relief is sought against Richards. The plaintiff asks for a judgment against Cox for the sum of \$40, with interest from the twenty-first day of April, 1876.

A covenant of warranty runs with the land, and may be availed of by suit in his own name by any one to whom the same shall come by deed. 3 Wash. on Real Property (4th Ed.), 469. The action for breach of the covenant should be brought by him who is the owner of the land; and as such the assignee of the covenant at the time it is broken. *Id.* Kent says: "They (the

covenant of warranty and for quiet enjoyment) are therefore in the nature of real covenants, and they run with the land conveyed, and descend to heirs, and vest in the assignees or the purchaser." 4 Kent Com., 471.

Does a mortgagee in this state take such an estate in the lands mortgaged as to make him the assignee of the covenants in deeds prior to his mortgage?

In *Kyger v. Ryley*, 2 Neb., 28, it is said: "The mortgage is a mere pledge or collateral security, creating a lien upon the mortgaged premises, but conveying no title or vesting no estate, either before or after condition broken." And this doctrine was adhered to in *Webb v. Hoselton*, 4 Neb., 318. *Hurley v. Estes*, 6 Id., 386. *Union Mutual Life Insurance Co. v. Lovitt*, 10 Id., 301. The mortgagee therefore does not become the assignee of the covenants running with the land, and cannot maintain an action thereon. He may maintain an action on the covenants in his mortgage, but this he does not seek to do. The judgment of the district court must therefore be affirmed.

JUDGMENT AFFIRMED.

THE CITY OF CRETE, PLAINTIFF IN ERROR, v. MARYETTA
CHILDS, DEFENDANT IN ERROR.

11	252
12	606
13	827
17	154
18	92
19	619
11	252
26	638
11	252
30	41
11	252
39	723
11	252
56	819
11	252
60	796

1. **City of Second Class: CLAIM AGAINST, FOR DAMAGES CAUSED BY DEFECTIVE SIDEWALK.** To maintain an action against a city of the second class for damages occasioned by a defective sidewalk, it is not necessary to present the claim to the city council for allowance. A presentation of such claim, however, is essential to a recovery of costs against the city.
2. **Instruction to Jury.** Where an instruction is so worded as necessarily to leave the jury to uncertain conjecture as to the meaning, and therefore liable to lead the jury astray in their consideration of the case, it is good ground for a new trial.

City of Crete v. Childs.

3. ———. In this case the instruction was that under certain given "circumstances, the city is liable for its failure to perform its duties," but there was no explanation by the judge as to what those "duties" were. *Held*, erroneous.
4. **Rule of Damages.** In an action against a city to recover for damages caused by a defective sidewalk, *Held*, that the plaintiff could only recover for those damages which were directly traceable to the injury and negligence complained of as the probable cause; that damages caused by the negligence of the plaintiff in the employment of medical aid were not chargeable to the city.
5. **Instructions must be Based upon the Evidence.** If an instruction assume the possible existence of a state of facts which the jury have no right to find, there being no evidence, it is error.

ERROR to the district court for Saline county. The action there was to recover damages alleged to have been sustained by reason of a defective sidewalk in the city of Crete. Trial below before WEAVER, J., and a jury, resulted in a verdict of \$300 for plaintiff, upon which she had judgment, and the city brought the case here for review upon a petition in error.

M. B. C. True and *J. R. Webster*, for plaintiff in error.

Plaintiff having exhibited to the jury the helpless condition of her limb, and medical experts having testified to its condition and the character of the injury, she was interrogated on cross-examination as to an electric shock and a runaway accident occurring to her subsequent to the injury, which was erroneously rejected. *Chandler v. Allison*, 10 Mich., 460-475. *Livingston v. Keech*, 34 N. Y., Sup. Ct., 547. *Pryor v. Harris*, 30 Ala., 118. Also, the rejection of a question to a medical expert, "What in the exercise of due diligence and reasonable care for the cure the plaintiff should do, after an injury of this character," an effort

being made to show that the permanent character of the injury was caused by unskillful treatment. *Chandler v. Allison*, *supra*. Shearman & R. on Negligence, 598. Also, the rejection of testimony of one Fuller, who lived near by the defective sidewalk, if, in his remembrance, he considered the sidewalk dangerous to use. *Lund v. Tyngsborough*, 9 Cush., 86. *McCreary v. Turk*, 29 Ala., 244. *Whittier v. Franklin*, 46 N. H., 23. *Alexander v. Sterling*, 71 Ill., 366. Also, the city charter, requiring bills to be verified upon oath before suit commenced, and that called sessions of the council shall consider only matters presented in writing, neither of these requisites having been complied with, there was no legal proof that plaintiff had submitted her demand to the council. On the ninth instruction cited, Shearman & R. on Negligence, 598. *Stover v. Bluehill*, 51 Me., 439. *Eastman v. Sanborn*, 8 Allen, 594. *Darling v. Williams*, 85 Ohio St., 62. On tenth instruction. *Dewey v. Detroit*, 15 Mich., 307. *McGinty v. Mayor*, 5 Duer, 674. *Billings v. Worcester*, 102 Mass., 329. *Dozlon v. Clinton*, 83 Ia., 397.

Hastings & McGintie, for defendant in error.

As to notice of defect in sidewalk. *Mayor v. Sheffield*, 4 Wall., 189. *Ward v. Jefferson*, 24 Wis., 342. *Hubbard v. Concord*, 85 N. H., 52. 2 Dillon, Mun. Corp., 920. *Alexander v. President, etc.*, 71 Ill., 366.

As to Mr. Fuller's testimony. 1 Phill. Ev., 768, 781, 784. 1 Greenl. Ev., 440. The seventh instruction. *City v. Olmstead*, 5 Neb., 452, and cases there cited. Ninth instruction. *Stewart v. Ripon*, 38 Wis., 584. Tenth instruction. Angel on Highways, 257. *State v. Campton*, 2 N. H., 513. *Heacock v. Sherman*, 14 Wend., 58. *Regua v. Rochester*, 45 N. Y., 184. *Centerville v. Woods*, 57 Ind., 192.

LAKE, J.

We discover no error in the rejection of testimony calling for a reversal of the judgment. And the record of the proceedings of the city council of Crete, upon this claim, was properly admitted. Such presentation of the claim, however, was not requisite to a recovery of damages, as it could only affect the question of costs. Section thirty-four of the act for the incorporation of cities of the section class provides, that "no costs shall be recovered against such city in any action brought against it for any unliquidated claim which has not been presented to the city council," etc. Gen. Stat., 151.

As to the instructions given to the jury, three are mentioned in the brief of counsel for plaintiff in error as being erroneous, viz.: the seventh, ninth, and tenth. The seventh was in these words: "That a city has the exclusive control of its streets, and ample means are placed under control of its constituted authorities to maintain its streets in a safe condition, and the sidewalk is a part of the street. Under these circumstances the city is liable for its failure to perform its duties."

The first clause of this instruction contains three propositions which are doubtless correct. These propositions, or facts, are the "circumstances" or premise from which the judge draws the conclusion and tells the jury that "the city is liable for its failure to perform its duties." But to what duties did he refer, the non-performance of which would lead to the result of rendering the city liable to the plaintiff? We may presume, and it is doubtless true, that he had in mind only those legal obligations respecting the streets which the city of Crete was under to the public at the time of the accident complained of, but what assur-

ance is there that this was the understanding derived by the jury? They were not so told, either in this or in any other of the several instructions given them in charge. They should have been instructed particularly by the judge as to what duties he referred in this remark, for it was upon one of the most vital points in the case, and one in the consideration of which they ought not to have been left to depend upon mere conjecture as to his meaning, nor to adopt their own views of what the duties of the city were, as they would most probably do under the circumstances. We think too much was left to mere conjecture by this instruction, which, to say the least, was very liable to lead the jury astray in their consideration of the case.

The ninth instruction was, that if the plaintiff "employed such person or persons to attend her, for the purpose of attending her injury, as she thought competent, and in good faith, she is not responsible for the result, unless caused by some act of negligence on her part."

The rule of this instruction, otherwise expressed, seems to be that the "thought" or belief of the plaintiff as to the competency of the persons she employed to attend to her injured limb, provided she was guilty of no negligence in any other particular, was sufficient to relieve her of all responsibility for the result of the treatment, no matter how injurious and productive of evil consequences it may have been, and to fasten it upon the city. In this we think there was error. Such is not the rule of the law applicable in a case like the one under consideration. If the city were liable at all, it was only for those damages that are directly traceable to the injury and negligence complained of as the probable cause. "Generally, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate

cause of an injury, the injury must be the natural and probable consequence of the negligence or wrongful act, one which ought to have been foreseen in the light of attending circumstances. The natural and probable consequences of a wrongful act or omission are not necessarily chargeable to the misfeasance or nonfeasance, when there is a sufficient intermediate cause operating between the wrong and the injury." *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S., 469.

As between the city and the plaintiff, it was unquestionably her duty to exercise reasonable care and diligence in the employment of medical aid; and if she failed in this particular, and evil resulted in consequence of such omission of duty, surely there could be no justice in a rule relieving her and placing the responsibility upon the city. The proximate cause of such evil would not be the negligence of the city, but her own, and she should bear it.

By the tenth instruction the jury were told that if "the injury to the plaintiff was sustained by reason of the defective manner in which the sidewalk was originally constructed, no notice to the city authorities of the defect need be proven. They are bound to take notice of the manner in which sidewalks were originally built."

This instruction was not warranted by the evidence. There was no testimony given to the effect that the city built the walk, nor was there any that, when built, it was left in an unsafe condition; but on the contrary it was distinctly proved by the testimony of at least three of the plaintiff's own witnesses, viz.: Killian, Petit, and Bickel, that up to a short time before the accident to the plaintiff, the walk was of smooth surface and in a perfectly safe condition. This instruction assumed the possible existence of a state of facts which the jury had no right to find, and was therefore at

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variance with the rule enforced by this court, in *Meredith v. Kennard*, 1 Neb., 312, *Meyer v. Midland Pacific R. R. Co.*, 2 Neb., 319, and other cases.

For these errors in the instructions, the judgment is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

BENJAMIN COONEY, PLAINTIFF IN ERROR, v. PATRICK BURKE, SR., AND PATRICK BURKE, JR., DEFENDANTS IN ERROR.

1. **Assault and Battery: WHO ARE PRINCIPALS IN.** In an assault and battery, not only he who is the actor or actual perpetrator of the offense, but he also who, being present when the act is done, aids and abets therein, is a principal and liable as such at the suit of the injured party.
2. ———: ———. Evidence examined and held sufficient to warrant a verdict against the defendant as principal in the battery complained of.

ERROR from the district court for Nemaha county.
Tried before POUND, J.

J. H. Broady, for plaintiff in error.

S. A. Osborn, for defendants in error.

LAKE, J.

The action below was brought to recover damages for an assault and battery charged to have been committed by the defendants upon the person of the plaintiff. When the evidence had all been submitted, the court being of opinion that it was insufficient to warrant a verdict against the defendant Patrick Burke, Jr.,

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directed the jury to find in his favor, which they did. And this is the principal error complained of.

The evidence shows that the elder Patrick Burke, as the absolute perpetrator, or principal in the first degree, committed a grievous battery upon the person of the plaintiff, by knocking him down and pounding him with a stout hickory stick about three feet in length. The younger Burke, although present at the time, did no act of personal violence to the plaintiff; but it is claimed by counsel that he did aid, abet, and encourage his father in what he did, to an extent that made him a principal in the second degree, and responsible for all the consequences that resulted therefrom. "A man may, in contemplation of law, be a principal in an offense, in either of two degrees. A principal in the first degree is he who is the actor or absolute perpetrator of the crime; and in the second degree, he is, who is present aiding and abetting the fact to be done." 2 Broom & Hadley's Com., Am. Ed., 358. There is, however, no substantial difference between principals in the first and second degrees. The distinction is nominal merely. See also Brown's Law Dictionary, 280.

Such being the law as to what is sufficient to constitute one a principal in an offense, let us look to the testimony and ascertain whether Patrick Burke, Jr., is within the rule, or rather whether there was evidence sufficient to have justified the jury in holding him as a principal offender.

In the testimony given by the plaintiff, we find the following:

Q. Where was young Burke?

A. He was holding Charley Howell.

Q. What was Charley Howell doing.

A. I suppose he was trying to get away to take the club from him.

And on cross-examination, in speaking of young Burke, this was given:

Q. Did he fight you that day?

A. No, sir, he did not.

Q. Did he offer to do it?

A. I don't know. I was there, and he kept Charley Howell from saving me.

Q. How do you know that was so?

A. He had him fast with a hand round his neck, this way. (Indicating.)

Q. Did you see him?

A. Of course I saw it. He kept Charley Howell from taking the club.

Q. And he had his head under his arm?

A. Yes.

Q. You are positive of that?

A. Yes.

And Charley Howell, the person thus held, swore on this point as follows:

Q. What was Pat. Burke doing?

A. Not anything, but I wanted to take Burke off, and he took my wrist and stopped me, and said the old gentleman had not given him enough yet.

Q. How far were you off?

A. Eight or ten steps.

And on his cross-examination he said:

Q. What part did Pat. Burke take in that fight?

A. Not anything that I saw, except keeping me back.

Q. What did he do?

A. He told me to hold on, the old man had not given him enough.

In addition to what we have here quoted, there was some other testimony of like import, none of which was contradicted in any material part. And its effect was to show that young Burke, by his presence, words,

 Rlewe v. McCormick.

and active interference, both encouraged, and by preventing Howell from interfering to stop it, aided and abetted his father in the battery of the plaintiff. This clearly brought him within the rule by which one who is not the actual perpetrator of an offense becomes a principal therein and punishable as such. We are clearly of opinion that the evidence against young Burke, as found in the record before us, would have warranted the jury in returning a verdict against him, and that the instruction to find in his favor was error, for which the judgment must be reversed and a new trial awarded.

REVERSED AND REMANDED.

CHARLES RIEWE, PLAINTIFF IN ERROR, v. ANNA M. G. McCORMICK, DEFENDANT IN ERROR.

1. **Replevin.** One M. purchased a building occupied by R., as tenant, and without giving him the statutory notice to quit, recovered possession of the building by an action of replevin. *Held*, that replevin was not the proper remedy, and R. was entitled to recover all damages sustained.
2. **Damages.** Exemplary or punitive damages cannot be recovered.

ERROR from the district court for Douglas county.
Tried below before SAVAGE, J.

John I. Redick and *W. J. Connell*, for plaintiff in error.

George E. Pritchett (with *George W. Ambrose*), for defendant in error.

MAXWELL, CH. J.

This is an action of replevin brought by defendant in error to recover the possession of the two-story frame

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44	710
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store building situate on the middle third of lot 8, in block 118, in the city of Omaha. It appears from the bill of exceptions that the plaintiff rented the premises for one year from the first day of June, 1877, the rent to be paid at the end of each month. The plaintiff claims that he rented the premises the second time for one year from the first day of June, 1878, the rent to be paid monthly in advance. This is denied, and is properly a question to be determined by a jury. It is clearly proved, however, that he had paid his rent for the month of June, 1878. The property was owned by Messrs. Sweezy and Root, and on or about the seventh day of June, 1878, Mr. Sweezy served a notice on the plaintiff to leave the premises. On or about the twenty-fifth day of June, 1878, the defendant purchased the building in controversy, and on the first day of July, of that year, demanded possession thereof from the plaintiff, which not being given, this action was immediately instituted. On the trial of the cause, the jury found in favor of the plaintiff in error, and assessed his damages at the sum of \$150. He now assigns various errors, which will be considered in their order.

The fourth instruction given by the court on its own motion is as follows: "On the other hand, (if) you find from the testimony that the lease to Mr. Riewe had not been renewed, and that prior to the commencement of this action the building had been sold to the plaintiff, while the land on which it stood had been conveyed to another party, the parties intending to make such building personal property, then the plaintiff would have the right to take possession of the house by a writ of replevin." This instruction in effect told the jury that if the plaintiff's lease had expired, the defendant, by purchasing the building, thereby converted it into personal property, for which an action of replevin would lie without the statutory notice to quit.

Riewe v. McCormick.

To this we cannot give our assent. The defendant, by purchasing the building, acquired no greater rights than were possessed by the lessor, and took subject to whatever rights the plaintiff possessed in the premises. The court therefore erred in giving the instruction.

The court refused to give the following instruction: "The testimony in this case shows that on the 1st day of July, 1878, the said defendant Riewe was in the peaceable possession of the premises in controversy. The plaintiff had no right, therefore, to take forcible possession of the building and remove the defendant's goods therefrom. And the fact that such possession and removal was under and by virtue of a writ of replevin sued out by plaintiff for such purpose will not exempt plaintiff from all proper damages by reason of such forcible taking possession and removal of defendant's goods." This instruction should have been given. There is no conflict in the testimony that the plaintiff was in the peaceable possession of the premises. He claimed under a lease for a year, and the testimony of the defendant tended to show that the lease had expired on the preceding day, but no notice given to quit. In either case, the action of replevin was not the proper remedy.

The statute of forcible entry and detainer requires at least three days notice before proceedings are instituted. Sec. 1022 Civil Code. Gen. Stat., 689.

In the case of *Yager v. Wilber*, 8 Ohio, 399, it was held that this remedy is not limited to the cases enumerated in section 19 of the statute, but applies to all cases of entry or maintenance of possession by force.

In *Leetzey v. Herchelrode*, 20 Ohio St., 334, it is held that the statutory notice may be served as well before as after the expiration of the term.

In *Nason v. Best*, 17 Kansas, 408, it is held that the action cannot be maintained unless the notice is given.

If a party cannot maintain an action to recover the summary possession of premises, without the statutory notice, can he override the law, and by the summary process of replevin demand possession of the premises, which not being immediately given, proceed to throw the goods of the lessee in the street and eject him and his family from the possession of the premises? No case has been cited holding that the law could be thus evaded, and I think none such can be found. It is apparent that the process of the court, in this case, was used as a cover to perpetrate a wrong upon the plaintiff, for which the defendant is liable for the full amount of damages sustained.

The plaintiff asked certain instructions as to exemplary damages, which were properly refused. The word "damages" is defined by Webster as "the estimated reparation in money for detriment or injury sustained; a compensation, recompense, or satisfaction to one party for a wrong or injury actually done to him by another."

In *Boyer v. Barr*, 8 Neb., 68, it was held that in addition to full compensation for the injury sustained, there cannot be added a further sum as a *fine* for the punishment of the defendant. See also *Roose v. Perkins*, 9 Id., 304-5. Damages should be equal in amount to the injury sustained; but upon what principle should they be given in excess of that amount? In law, the injured party, upon being paid the damages sustained by the injury, has received full compensation therefor. Why, then, should the property of the party causing the injury be taken from him and given to another without compensation? Constitutional guarantees of the rights of private property amount to but little if courts sanction its practical confiscation under

 Grant v. Marshall.

the name of exemplary or punitive damages. And the effect of permitting the jury to give exemplary damages is to allow them to return a verdict for such sum as their prejudice or caprice may prompt them to do, without regard to the amount of the injury. If it is said that these damages are imposed as a punishment, it is a full and sufficient answer to say that the state inflicts punishment, and not individuals. The judgment of the district court is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

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PATRICK J. GRANT, PLAINTIFF IN ERROR, V. ALONZO D. MARSHALL, DEFENDANT IN ERROR.

Forcible Entry and Detainer: VERDICT. In an action of forcible entry and detainer, where the only errors assigned are that the judgment is against the weight of evidence, it will not be reversed, unless it is clearly wrong.

ERROR from the district court for Lancaster county.
Tried below before POUND, J.

Galey & Abbott, for plaintiff in error.

A. J. Sawyer, for defendant in error.

MAXWELL, CH. J.

This is an action of forcible entry and detainer. On the trial of the cause before the justice of the peace, judgment was rendered in favor of the defendant in error, which was affirmed in the district court. The errors assigned in this court are, in substance, that the judgment is against the weight of evidence.

The State v. Patterson.

It appears from the bill of exceptions, that the plaintiff in error occupied certain premises belonging to the defendant in the city of Lincoln, as a saloon, under a lease which expired on the 1st day of May, 1880; that the defendant requested the plaintiff to lease the premises for another year, which he promised, but it is claimed failed to do, but did lease the same for one month, being a lease for a few days after the expiration of his license. The question in dispute is whether the renewed lease was for one month or one year. Upon this question the testimony is conflicting; that of the plaintiff being that the lease was for one year, and the defendant testifying that the lease was for one month. Where the only ground of objection is that the verdict or judgment is against the weight of evidence, the rule is well settled in this court, that if the verdict or judgment is not clearly wrong, it will not be disturbed. In our opinion, the judgment is sustained by a preponderance of the testimony, and is affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. SELDEN N. MERRIAM,
V. JAMES N. PATTERSON.

1. **Mandamus: TAX DEED.** In an application for a peremptory writ of mandamus to compel the treasurer of C. county to execute certain tax deeds, answers were filed setting up the pendency of actions in other courts to have the tax proceedings declared void. On demurrer to the answer, *Held*, in such case the court will not entertain jurisdiction.
2. **Taxes: ASSESSMENT.** A valid assessment, levy of taxes, and sale of the realty, are absolutely essential to the validity of a tax deed.

ORIGINAL action in mandamus.

E. F. Warren, for relator.

When a sale of realty for taxes has occurred and a defective deed executed and delivered to the purchaser thereon, the tax purchaser is entitled to a valid deed, and the treasurer can be compelled to execute a second one. *Johnson v. Chase*, 30 Iowa, 308. *Gray v. Coan*, 30 Iowa, 536. *State v. Winn*, 19 Wis., 304. *Woodman v. Clapp*, 21 Wis., 353. *Maxcy v. Claburg*, 1 Gilm., Ill., 26. *Clippinger v. Tuller*, 10 Kas., 377. *Bank v. Mersereau*, 3 Barb., Ch. 578.

Sam. M. Chapman, for respondent.

A defense setting up the pendency of other proceedings relating to the same subject matter, which if true, must justify the respondent from doing the things commanded by the alternative writ, is good. High on Legal Remedies, secs. 21, 472-3. *State v. Jones, county judge*, 10 Iowa, 65. *People v. Wiant*, 48 Ill., 268. *People v. City of Chicago*, 53 Ill., 424.

MAXWELL, CH. J.

This is an application for a peremptory writ of mandamus to compel the defendant, who is county treasurer of Cass county, to execute and deliver to the relator tax deeds for certain real estate alleged to have been purchased by him at tax sale. An alternative writ was allowed at a former term of this court, to which the defendant filed an answer alleging: That an action was then pending in the district court of Cass county, to set aside a tax deed made by W. L. Hobbs, a former treasurer of said county, to said Merriam, for a portion of the land described in said writ,

upon the ground that there was no assessment of said land for the year 1872, that being the year for which it is claimed the tax was delinquent, and that said land was sold while the owner was in actual possession of the same and had a sufficient amount of personal property out of which said taxes could have been collected in Cass county, of which said treasurer had full knowledge. Similar facts are set up as to the other tracts for which a deed is sought.

L. G. Todd, as guardian for the minor heirs of Robert Latta, deceased, was permitted to intervene, and filed an answer, alleging that the north-west quarter of section No. twelve north, of range twelve east of sixth principal meridian, belongs to the heirs of said estate; that at the time said premises are claimed to have been sold for the delinquent taxes set forth in the relator's writ, there had been no valid assessments of said real estate made according to law, upon which any tax might be levied, and there never was any legal or valid levy of taxes; and that said defendants have commenced an action in the district court of Cass county to set aside said tax deed, which cause, on the application of the relator, has since been removed into the circuit court of the United States, and is still pending and undetermined. To these answers the relator filed a general demurrer. The cause is now submitted to the court upon the pleadings. It appears that tax deeds have already been issued to the relator for the lands in controversy, and that the actions referred to in the answers were instituted for the purpose of setting aside said deeds and the proceedings upon which they are based. This being the case, this court will not entertain jurisdiction. To do so would be oppressive. The cases are pending in a court having jurisdiction of the subject matter and the parties. The defendants are there asking for affirmative relief against

 Johnson v. Payne:

the very tax proceedings which the relator seeks to have declared valid, and he cannot be permitted to change the forum by a proceeding of this kind. The allegations of the answer, if true, form a complete defense to the action. A valid assessment, levy of taxes, and sale of the realty, are absolutely essential to the validity of a tax deed, and a party claiming the same must rely upon his naked legal rights, and if there is any essential defect in the proceedings the deed is void. For these reasons the writ must be denied.

WRIT DENIED.

AUGUSTUS JOHNSON, PLAINTIFF IN ERROR, v. MOSES U.
PAYNE, DEFENDANT IN ERROR.

1. **Mortgaged Property: TAXES AGAINST: PAYMENT BY MORTGAGEE: REMEDY AGAINST MORTGAGOR.** A mortgagee, for the protection of his security, has the right to pay the taxes thereon, or to redeem the same from tax sale. The amount which he is required to pay for such purpose is a valid claim against the mortgagor, enforceable in the same manner as the mortgage debt, and continuing until the satisfaction of the mortgage.
2. ——— : ———. Whatever amount is due under the mortgage at the time of foreclosure, including taxes so paid, constitutes but a single and indivisible demand, and cannot be separated and collected by several actions.

ERROR from the district court for Otos county. Tried below before POUND, J. Action by a mortgagee against mortgagor, after foreclosure, on the covenants to "keep all taxes paid," for moneys paid to redeem land from tax sale.

E. R. Warren, for plaintiff in error.

H.

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59	597

Johnson v. Payne.

The extinguishment of the debt extinguishes the mortgage for every available purpose. *Halsey v. Reed*, 9 Paige, 446. *Blunt v. Walker*, 11 Wis., 348. *Mowry v. Hood*, 12 Wis., 429. Jones on Mortgages, 77. Rawle on Cov., 459. *Sherman v. Sherman*, 3 Ind., 337. *Le Beau v. Gluze*, 8 La. Ann., 475. *Hitchcock v. Merrick*, 18 Wis., 357. The petition shows that in March, 1877, before the decree in foreclosure, Payne had paid the taxes sued for. They might and should have been included in his decree. *Cook v. Craft*, 3 Lans. (N. Y.), 512. *Dale v. M'Evor*, 2 Cow., 118. *Ellsworth v. Lockwood*, 42 N. Y., 89-96. *Brown v. Simmons*, 44 N. H., 475. *Southard v. Dorrington*, 10 Neb., 122.

Covell & Ransom, for defendant in error, cited. *Eagle Fire Ins. Co. v. Bell*, 2 Ed. Chy., 630. *Brown v. Cascaden*, 43 Iowa, 105.

LAKE, J.

The material averments of the petition were proved on the trial, and although presented in various forms the only really important question for our determination is whether they authorized the plaintiff below to recover the money demanded.

The only warrant for the payment of the taxes and the redemption of the land from the tax sale by Payne was derived from the mortgage. As mortgagee he had the right to make such payment and redemption, for the proper protection of his security, even independently of the express covenant in the mortgage that the mortgagor would do so. And the amount which he was thus required to pay at once became a valid claim against the mortgagor, enforceable in the same manner as the mortgage debt, and continuing until the satisfaction of the mortgage. *Southard v. Dorrington*, 10 Neb., 119.

The rule then is—and it is admitted by counsel for the plaintiff in error—that the expense thus incurred in protecting the security from impairment might have been included in the foreclosure suit, and the amount there recovered increased accordingly. But this was not done. The foreclosure proceedings were commenced and carried forward to a final decree, and sale of the mortgaged premises, the sale confirmed, and an order made for the payment by the mortgagor of a small balance found to be unsatisfied by the proceeds of the sale, which was complied with. While these steps were being taken, no mention whatever appears to have been made of this expenditure by the mortgagee for the preservation of his security.

It cannot, we think, be seriously questioned that one result of these foreclosure proceedings was the total extinguishment of the mortgage. The payment, according to the order of the court, of the balance remaining after exhausting the security, certainly worked a complete satisfaction of the decree, and consequently of all rights under the mortgage, which had become merged in it. In the action to foreclose, the mortgagee set forth what he claimed under the covenants of the mortgage, and submitted to the court his prayer for relief, which was granted. This, we think, is as far as he can go. The decree, with which he appears to have been satisfied, as he took no appeal, nor in any manner questioned its correctness, was a final adjustment of all his existing rights under the mortgage, and by it both he and the mortgagor are bound.

The case of *Hitchcock v. Merrick*, 18 Wis., 357, was not materially different in its facts from the one we are now considering. In that case, however, the taxes were paid after the decree and sale, and it was there held that an action for the amount so paid could not be maintained, for the reason that the mortgage had

been extinguished by the previous decree and sale of the property. That the covenant to pay the taxes "is collateral and subordinate to the debt" secured by the mortgage, "and that when the debt is extinguished the covenant can serve no further purpose." See also the following cases on this point. *Tice v. Armium*, 2 John. Ch., 125. *Cox v. Wheeler*, 7 Paige, 248. *Ferris v. Crawford*, 2 Denio, 595.

From this it would seem that whatever amount is due under the mortgage at the time of its foreclosure constitutes but a single and indivisible demand, and therefore cannot be separated and collected by several actions. We are not aware that there is any distinction between legal and equitable causes of action in this respect. Therefore, applying the rule applicable in such cases, we must hold that neither the facts of the petition nor the proofs show a cause of action on which the defendant in error can possibly recover. The judgment must be reversed, and the action dismissed at the costs of the defendant in error.

JUDGMENT ACCORDINGLY.

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S. L. SHELDON, PLAINTIFF IN ERROR, V. MATHIAS J. WILLIAMS AND H. C. STOLL, DEFENDANTS IN ERROR.

1. **Instructions** not warranted by the evidence, *Held*, erroneous.
2. **Principal and Surety.** The mere failure of a creditor to institute an action against the principal debtor at the time the debt becomes due will not discharge the surety.

ERROR from the district court for Gage county.
Tried below before WEAVER, J.

Pemberton & Forbes, for plaintiff in error. The machine being a mere chattel security for the note, and never having been reduced to possession by the creditor, the failure to foreclose the lien and apply proceeds in payment of the debt did not discharge the surety. *Burr v. Boyer*, 2 Neb., 265. 1 Story Eq. Jur., sec. 501. Brant on Suretyship, sec. 390. *Hays v. Ward*, 4 Johns. Ch., 131. *Jones v. Tincher*, 15 Ind., 308. *Brown v. Brown*, 17 Ind., 475. *Canal Co. v. Escoffie*, 2 La. An., 830. *Bank v. Godden*, 15 Ala., 616. *Freaner v. Yingling*, 37 Md., 491. 3 Lead. Cas. in Eq. (3d Am. Ed.), 556. 2 Daniel Neg. Inst., 1311, 1326, 1339. *Villars v. Palmer*, 67 Ill., 206. *Schroeppel v. Shaw*, 3 Comst., 446.

Hale and Hardy, for defendants in error. A creditor who has the effects of the principal under his control for the security of the debt, is a trustee for all parties concerned, and if such effects are lost by want of ordinary diligence of the creditor, the security is discharged to the extent that he is injured. Brandt on Suretyship, sec. 384. *Douglas v. Reynolds*, 7 Pet., 113. *Kemmerer v. Wilson*, 31 Pa. St., 110. *Downer's Adm'r v. Zanesville Bank*, Wright's Rep., 477. 5 Waits, Actions and Defenses, 239. The creditor having received security from the principal debtor, the surety is entitled to be credited to the extent of the avails thereof. *Wright v. Austin*, 56 Barb., 13.

MAXWELL, CH. J.

This action was brought in the district court of Gage county, upon a promissory note, of which the following is a copy:

"\$75.00. Joliet, Will County, Ill., July 17, 1877.

"On or before the first day of October, 1878, for value received in one Meadow King Mower, No. 4040,

Sheldon v. Williams.

I promise to pay S. L. Sheldon, or order, seventy-five dollars, at the First National Bank in Joliet, Ills., with interest at the rate of six per cent per annum, if paid when due, and ten per cent per annum if not paid when due, from date until paid. I also agree to pay reasonable attorney's fees if suit is commenced to collect this note. The express condition of the sale and purchase of said machine is such that the title, ownership, and right of property does not pass from the said S. L. Sheldon until this note and interest is paid in full. That the said S. L. Sheldon has full power to declare this note due and take possession of said machine at any time he may deem himself insecure, even before the maturity of this note. For the purpose of obtaining credit, I certify that I own in my own name acres of land in the town of Joliet, county of Will, State of Illinois, with acres improved, worth at a fair valuation \$..... It is not encumbered by mortgage or otherwise, except the amount of \$..... I own \$400 worth of personal property over all indebtedness except the encumbrance on my land, if any.

"Post-office, Joliet.

MATHIAS J. WILLIAMS.

"No. 4040.

H. O. STOLL."

The defendant Stoll answered the petition, alleging that he signed said note as surety; that the plaintiff failed to take the machine in question at the time the note became due, and apply the proceeds thereof to the payment of the note, although said Williams continued to keep said machine, and was then residing near Joliet; and that prior to the commencement of the action, he had a settlement with the agent of the plaintiff, and was discharged from the note in question. On the trial of the cause a verdict was rendered for the defendant. Judgment having been rendered in favor of the defendant, the plaintiff brings the cause into this court by petition in error.

Sheldon v. Williams.

The machine was sold to Williams, presumably for use, and was delivered to him; and the testimony fails to show any negligence on the part of the creditor in permitting him to retain the possession of the same. The court instructed the jury as follows: "But if, on the other hand, you shall find from the proofs that the plaintiff knew of the whereabouts of the machine, and failed to proceed to take possession of it and reduce that in payment of the note, then to that extent this defendant would be released. If you find that state of facts to exist—that is, if you further find the defendant was surety on the note only, which he has alleged in his answer, and if you find that the plaintiff failed to use that diligence in the pursuit of the property that a man of ordinary care and prudence would have done, and for an unreasonable time neglected and failed to take any steps to secure the machine for which the note was given, then to the value of the machine you will relieve the defendant." This instruction is entirely unsupported by the evidence, there being no testimony whatever to show negligence on the part of the creditor.

The court further instructed the jury: "It is alleged further in the answer, that the principal debtor, Williams, was living at the place near Joliet, Illinois, where the machine was sold, and that he continued to reside there after the note became due, and that he was responsible. If you shall find this fact to exist, and that he was for some time after the note became due responsible and that no proceedings were had against him, then you will find for the defendant." We are unable to find any testimony in the record which would justify this instruction; and the mere failure of the creditor to institute an action against the principal at the time the debt becomes due will not discharge the surety. *Dillon v. Russell & Holmes*, 5

Neb., 484, and cases cited. Where a contract binds the surety for its performance, it is his duty to perform it or see that it is done. And this rule applies to the payment of money, unless the creditor by his conduct has released the surety from his obligation. The judgment of the district court is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

11	276
19	332
19	336
19	387

11	276
27	93

11	276
46	60
46	164

11	276
44	370

11	276
60	113

JOHN OLESON, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Rape.** To constitute the crime of rape, where it appears that at the time of the alleged offense the prosecutrix was conscious and had the possession of her natural mental and physical powers, and was not terrified by threats or in such position that resistance would be useless, it must appear that she resisted to the extent of her ability.
2. —: **EVIDENCE.** In a prosecution for rape the prosecutrix may be asked whether she made complaint of the injury; but the particulars, when not a part of the *res gestæ*, are not evidence of the truth of her statement, and cannot be given as evidence in chief.

ERROR from the district court for Lancaster county.
Tried below before POUND, J.

M. H. Sessions and *A. G. Scott*, for plaintiff in error.

C. J. Dilworth, for defendant in error.

MAXWELL, CH. J.

The plaintiff was convicted of rape at the October, 1880, term of the district court of Lancaster county,

and sentenced to imprisonment in the penitentiary for three years. There are seventeen assignments of error, but two of which will be considered. It is objected that the verdict is not sustained by sufficient evidence. The only testimony to establish the charge is that of Barbara Kastel, the prosecuting witness.

In the case of *Garrison v. The People*, 6 Neb., 283, it was held that where the jury are satisfied beyond a reasonable doubt of the guilt of the accused from the testimony of the prosecuting witness alone, they will be justified in returning a verdict of guilty, as in many, if not most cases, it would be impossible to convict except upon such testimony. But by this it is not meant that the jury are bound to believe the unsupported testimony of the prosecuting witness and return a verdict of guilty. The accusation is easily made, and difficult to be defended against by one ever so innocent. Ordinarily there are circumstances connected with each case which tend to establish or disprove the charge, and thereby strengthen or diminish the credit to be given by the jury to the testimony of the prosecuting witness.

In the case of the *People v. Morrison*, 1 Parker Cr. Reports, 625, it is said, to constitute the crime there must be unlawful and carnal knowledge of a woman by force, and against her will. * * *

* * The prosecutrix, if she was the weaker party, was bound to resist to the utmost. Nature had given her hands and feet with which she could kick and strike, teeth to bite, and a voice to cry out; all these should have been put in requisition in defense of her chastity." Id.

In the *People v. Dohring*, 59 N. Y., 374, it is held that "in order to constitute the crime of rape of a female over ten years of age, when it appears that at the time of the alleged offense she was conscious,

had the possession of her natural mental and physical powers, was not overcome by numbers, or terrified by threats, or in such place or position that resistance would have been useless, it must also be made to appear that she did resist to the extent of her ability at the time, and under the circumstances."

In the case of *People v. Benson*, 6 Cal., 221, it is said: "That there was no outcry, though aid was at hand, and the prosecutrix knew it; that there was no immediate disclosure; that there was no indication of violence on her person, and that the act was committed at a time and under circumstances calculated to raise a doubt as to the employment of force, are put as strong circumstances of defense, not as conclusive, but as throwing a doubt upon the assumption that there was a real absence of assault."

In *Whitney v. The State*, 35 Ind., 506, the court say: "In prosecutions for this crime the best of judges of ancient and modern times have laid down certain tests by which to be governed in ascertaining the truthfulness of the party preferring the charge. They concur in saying that her evidence should be carefully considered; and if the witness be of good character; if she presently discovered the offense, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which will give greater probability to her evidence. But on the other hand, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had an opportunity to complain; if the place where the act was alleged to have been committed were such that it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned."

In the case at bar, the offense is alleged to have been committed about ten o'clock at night, in the shanty in which the prosecutrix resided in the city of Lincoln. Several neighbors resided within hearing distance, but she made no outcry. Her clothes were not torn, nor were there any marks of violence on her person to indicate a struggle, although there is some testimony showing there was a slight mark upon her neck; but she seems to have testified on the preliminary examination that there were no such marks. Taking the testimony of the prosecutrix as true, and it fails to show such resistance on her part as will warrant a conviction for rape.

The state, over the objection of the accused, was permitted to prove by Mrs. Mulrooney and Mrs. Crips what the prosecutrix had told them on the day after the commission of the alleged offense in regard to it. Greenleaf thus states the rule in regard to such admissions: "Though the prosecutrix may be asked whether she made complaint of the injury, and when and to whom; and the person to whom she complained is usually called to prove that fact, yet the particular facts which she stated are not admissible in evidence, except when elicited in cross-examination, or by way of confirming her testimony after it has been impeached. On the direct examination the practice has been merely to ask whether she made complaint that such an outrage had been perpetrated upon her, and to receive only a simple yes or no. Indeed the complaint constitutes no part of the *res gestæ*; it is only a fact corroborative of the testimony of the complainant; and when she is not a witness in the case is wholly inadmissible." 1 Greenleaf Ev., sec. 213.

The testimony referred to was not competent as evidence in chief to prove the commission of the offense, and the court below erred in admitting it for

Finch v. Vifquain.

that purpose. The particulars, when not a part of the *res gestæ*, are not evidence of the truth of the statement of the prosecutrix, and cannot be enquired into in her examination-in-chief, or proved by other testimony except in corroboration. *Johnson v. The State*, 17 Ohio, 593. *Baccio v. The People*, 41 N. Y., 265. *Lacy v. The State*, 45 Ala., 80. *The People v. McGee*, 1 Denio, 19. *Stephens v. The State*, 11 Geo., 225.

It is unnecessary to notice the other errors assigned. The judgment of the district court is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

11	280
24	228
11	280
43	131

JOHN B. FINCH, PLAINTIFF IN ERROR, V. VICTOR VIFQUAIN AND F. O. MARKS, DEFENDANT IN ERROR.

Libel: WORDS ACTIONABLE PER SE. The plaintiff was occupying the position of Grand Worthy Chief Templar in a temperance organization in this state, and also that of secretary of the State Temperance Alliance, and constantly engaged in the duties connected therewith. The defendants, as the petition alleged, falsely and maliciously published of him that he was "a seducer of innocent girls," and instanced an attempt on his part to debauch and ruin a young school girl, who at the time was a member of his own household. Also, that he "was an arch hypocrite and scoundrel who was simply using his talents for money-making purposes, and not through any sincerity in the cause in which he is laboring." *Held*, that each of these charges is *per se* actionable.

ERROR from the district court for Lancaster county. Heard below by POUND, J.

Mason & Whedon, for plaintiff in error, contending that the article is libelous *per se*, being printed and

Finch v. Visqualn.

published, and hence special damages need not be averred, cited *Rarr v. Moore*, 87 Pa. St., 385. *Tryon v. Evening News Assn.*, 39 Mich., 636. *Tillson v. Robbins*, 68 Me., 295. Holt's Law of Libel, 218-223. *Steele v. Southwick*, 1 Am. Lead. Cases, 123. *Whitney v. Janesville Gazette*, 5 Biss., 330. *Dexter v. Spear*, 4 Mason, 115. *Melton v. State*, 3 Humph., 389. *Colby v. Reynolds*, 6 Vt., 489. *Mayrant v. Richardson*, 1 Nott & M., 210. *Shelton v. Nance*, 7 B. Mon., 128. *Stow v. Converse*, 4 Conn., 17. *Clark v. Binney*, 2 Pick., 118.

Marquett, Deweese & Hall, for defendants in error, cited *Bisbee v. Shaw*, 12 N. Y., 67. *Heilman v. Shanklin*, 60 Ind., 425. *Wilson v. Fitch*, 41 Cal., 363. Townsend on Slander, sec. 182. *Strauss v. Meyer*, 48 Ills., 385. *Cook v. Cook*, 100 Mass., 194. *Hollingsworth v. Shaw*, 19 Ohio St., 430. *More v. Bennett*, 48 N. Y., 475. *Geisler v. Brown*, 6 Neb., 254.

LAKE, J.

This is a petition in error to reverse a judgment of the district court for Lancaster county. The judgment in question was in sustaining a general demurrer to a petition in an action for libel, the court holding that the publication complained of was not libelous.

A libel is a malicious defamation of a person expressed otherwise than by words, as by writing, print, figures, signs, or any other symbols. Brown's Law Dictionary, 208. Or, as expressed by Chancellor Kent, it is a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to injure the memory of one dead, or the reputation of one alive, and expose him to public hatred, contempt, or ridicule. 1 Kent's Com., 629.

The libel here charged was in print, and consisted of an article published by the defendants, in the *Daily*

State Democrat, a newspaper owned and controlled by them, and having a general circulation in the community where the plaintiff lived.

That the article so published is within the definitions of libel just given, seems to need no argument to make clear. That it was false and published maliciously, is conceded until denied by answer. The petition so alleges, and the demurrer admits the truth of all matters well pleaded. Of the charges thus made against the plaintiff, the most harmful probably is that of being "a seducer of innocent girls," in immediate connection with which a case is instanced of his attempt to debauch and ruin a young school girl, who, at the time, was a member of his own household. If this were true of the plaintiff, and generally known by his acquaintances, can any reasonable mind doubt that it would subject him to public hatred and contempt, and lead at once to his social ostracism?

It is alleged in the petition "that for a long time before, and at the time of the committing of the injuries by the said defendants," that the plaintiff had been and still was "Grand Worthy Chief Templar in a temperance organization, in the state of Nebraska, and secretary of the State Temperance Alliance, and constantly engaged in the discharge of his duties connected with these positions." In view of this calling and occupation of the plaintiff, there is another charge found in the article of but little, if any, less injurious tendency to his reputation than the one first noticed. This charge is that the plaintiff "was an arch hypocrite and scoundrel, who was simply using his talents for money-making purposes, and not through any sincerity in the cause in which he is laboring." This charge must have been intended by the publishers to degrade the plaintiff in the estimation of the community, and deprive him of that influence and temporal advantage

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which usually result from a sincere and blameless course of life. And it was well calculated to produce this effect among those for whose especial good the great temperance movement, in which the plaintiff occupied an influential position, was organized and is being carried forward. It was equivalent to charging that the confidential and honorable places which he was then intrusted with were gained, not through personal worth, but by means of falsehood and moral dissimulation on his part.

Being clearly of opinion that the publication charged is *per se* actionable, the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JAMES DONNELLY, PLAINTIFF IN ERROR, V. CENEK DURAS,
DEFENDANT IN ERROR.

1. **School District Treasurer.** The treasurer of a school district has no right to prosecute an action in his own name on a demand belonging to the district. Such action must be brought in the name of the district.
2. ———: **DEMAND AND RECEIPT OF SCHOOL FUNDS BY.** The treasurer of a school district cannot rightfully demand or receive school moneys belonging to his district from the county treasurer, except upon a warrant of the director, countersigned by the moderator of the district.
3. **School Funds of the County: WHEN COUNTY TREASURER MAY PAY OVER TO DISTRICT.** The county treasurer is not required or authorized to pay out funds standing to the credit of the county school fund until they have been duly apportioned by the county superintendent.

ERROR from the district court for Saline county. In 1876, 1877, and 1878, the treasurer of the city of Crete

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turned over to the county treasurer certain license moneys collected under a city ordinance. Plaintiff, who is treasurer of school district No. 2, which embraces said city, brought suit to recover the said moneys from the present county treasurer.

M. B. C. True, for plaintiff in error.

The constitution of 1875, which diverted license moneys collected from county to city school fund, and the legislature provided no new means by which the money could go directly from city to school district treasury. Hence, under General Statutes, sec. 72, 974, and sec. 41, 968, it was correctly paid to county treasurer, and an implied assumpsit arises. *Dumon's Adm'r v. Carpenter*, 3 Johns., 184. *Ripon v. Sch. Dist.*, 17 Wisc., 83. *Tecumseh v. Phillips*, 5 Neb., 305. *White v. Lincoln, Id.*, 505. *Hastings v. Thorne*, 8 Neb. 160.

W. G. Hastings, for defendant in error.

There is no allegation of any misapplication of the moneys by the defendant. The county treasurer, as such, had nothing to do with them. Const., sec. 5, Art. VIII. *Hastings v. Thorne*, 8 Neb., 160. The money being paid to the county school fund through its custodian, must be apportioned by the county superintendent, and if it has not been, mandamus is the proper remedy. The county is not responsible. *School Dist. v. Saline Co.*, 9 Neb., 403.

LAKE, J.

The demurrer to the petition was properly sustained. The facts stated do not constitute a cause of action. The plaintiff had no authority to prosecute an action in his own name on a demand, if one in fact existed,

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belonging exclusively to the school district. The district is a body corporate, and authorized to sue and be sued. Sec. 2, ch. 68, Gen. Stats. And the suit must be in the name by which the district is known, and not in that of its treasurer, who may, under certain circumstances, appear on behalf of the corporation and attend to the prosecution or defense, as the case may be. *Id.*, sec. 42. But in such case he must act in the name of the district.

If it be conceded that there were funds in the county treasury belonging to said school district, its treasurer was not only not authorized to sue for the same, but he could not even rightfully demand or receive them, except upon a warrant of the director, countersigned by the moderator of the district. Indeed, it would be the duty of the county treasurer to refuse any demand upon him for such funds, unless thus formally made as the statute directs. *Id.*, sec. 37.

Enough has already been said to show that the ruling of the district court upon the demurrer was correct, but there is still another particular in which the petition is totally deficient. The suit was commenced doubtless on the theory that, by refusing to pay over the money demanded of him as county treasurer, the defendant had rendered himself personally liable for the amount. And there is probably no doubt that for such refusal of a demand, properly made, he would be answerable to the district for the money wrongfully withheld. In the statement of such a cause of action, however, it would be necessary to show that the money was standing to the credit of the district when the demand was made. This the petition under consideration does not show, but, on the contrary, it is distinctly alleged: "That said money was by the treasurer of the county of Saline placed in the treasury of the county of Saline, and the same still there remains as part of

the school fund of the county of Saline." In this situation the money was not in a condition to be drawn against by the district, and the defendant would not have been justified in paying it out until duly apportioned by the county superintendent. But it may be said that the placing of these funds to the credit of the general school fund of the county was unauthorized. This may be so, but this action is not based on a misapplication of the money; and besides, it is not shown that the defendant held the office when the funds were paid into the treasury and so credited. If a misapplication were in fact made, it was probably done by one of his predecessors in office, for which he is in nowise answerable.

If, as is alleged, the money is still in the county treasury, standing to the credit of the county school fund, and can still be traced as coming from the city of Crete, as is alleged, it should be duly apportioned by the county superintendent to the proper district. When this is done, and not before, the county treasurer will be justified in paying it out on a proper warrant.

JUDGMENT AFFIRMED.

11 286.
39 649

ALFRED BURLEY, PLAINTIFF IN ERROR, V. JOSEPH H. MILLARD, DEFENDANT IN ERROR.

Discretion of Court. On the case made, *Held* to be error on the part of the district court, and a legal abuse of discretion, to refuse to allow the defendant to withdraw his assent to the entry of judgment as by consent in open court, and restore the cause to the calendar for trial.

ERROR from the district court for Douglas county.
Tried below before SAVAGE, J.

Redick and Connell, for plaintiff in error, cited *Gillette v. Morrison*, 9 Neb., 395.

George E. Pritchett, for defendant in error, cited *Helling v. N. E. Mort. Co.*, 10 Neb., 611. *High v. Bank*, 6 Neb., 155. *Seymour v. Street*, 5 Neb., 85.

COBB, J.

It appears from the affidavits preserved by the bill of exceptions in this case, that upon the call of the trial docket in the district court, upon reaching this cause, Mr. Connell, one of the attorneys for the defendant, under a misapprehension of the true situation and merits of the case, as he afterwards and now conceives, proposed to Mr. Pritchett, attorney for the plaintiff, that plaintiff might dismiss the case at his own cost, and retain the replevined property. That proposition was declined by Mr. Pritchett. Whereupon Mr. Connell left the court room after, as he states in his affidavit, having withdrawn said offer and having some spirited words with the counsel on the other side and having declared his readiness to try the case when reached in its order. It further appears, that soon after Mr. Connell left the court room, Mr. Pritchett changed his mind in regard to the matter, and after obtaining the somewhat indefinite assent of Mr. Redick, partner of Mr. Connell and one of the attorneys for the defendant, announced in open court that it was mutually agreed between the parties that judgment might be rendered in said cause in favor of the plaintiff for the possession of the property, and in favor of the defendant for the costs, which was so entered upon the judge's minutes. That after these proceedings had taken place, and about half an hour after he had left the court room, as before stated, Mr.

Connell returned thereto, and having learned what had taken place, and having informed Mr. Redick of the facts in the case, as he states, as having passed between him and Mr. Pritchett, both Connell and Redick sought to withdraw the consent of the defendant, so far as the same had been given by Mr. Redick, to the rendition of such judgment, and made known to the court what they claimed to be the true facts in the case, and notified Mr. Pritchett that application would at once be made to have said entry expunged; and the court, upon hearing the statements of the said Connell and Redick, notified the clerk not to make any record until the parties could be more fully heard.

It further appears that these facts were afterwards in due time brought to the attention of the court upon a motion to expunge the entry on the trial docket, entering judgment in said cause for plaintiff, the same as expressed in said motion not having yet been entered or carried on the journal of said court or signed by the judge, for the reason (as therein expressed) that the same was permitted to be entered under a misapprehension of the facts and the rights of said defendant, etc., which said motion was supported by the affidavits of Connell and Redick, stating the facts substantially as herein, with the addition on the part of Connell "that the original offer of affiant to consent to a dismissal of said case was made under a misapprehension of the facts and of the true rights of the defendant; that affiant then supposed that this action, which is one of two replevin suits relating to the property of the Omaha Horse Railway Co., involved only certain property which was supposed to be covered by the chattel mortgage to plaintiff, but upon a more careful examination of the mortgage and pleadings herein, affiant discovered that this suit involved a large amount of property not covered by said mortgage," etc., and on

Burley v. Millard.

the part of Redick that "he would not have consented had he not believed from the representations of Pritchett that it was clearly understood between him and Mr. Connell that that should be the disposition. That such consent was given by mistake and misapprehension of facts, and that there is a meritorious defense to said action," etc. Said motion was resisted by the affidavit of Mr. Pritchett, in which he does not differ in his statements of fact materially from either Connell or Redick.

The court does not seem to have treated this motion as a question of practice or proceeding *in limine*, but first ordered a regular judgment by consent of parties to be entered up, and then seems to have considered this motion in the light of a bill in equity to set it aside for fraud, and made a finding in the case "that said judgment was rendered by consent of both parties in open court, and that the defendant consented to such judgment without any mistake on his part or fraud on the part of the plaintiff," etc.

After the statement was made in open court by Mr. Pritchett, in the presence of Mr. Redick and with his tacit assent, that judgment by agreement of parties was to be entered in the case, and the court had entered the same on his minutes or trial docket, it was undoubtedly a matter of discretion on the part of the court to allow such assent to be withdrawn, his minutes expunged, and the cause restored to the calendar for trial.

In the case of *Mills v. Miller*, 3 Neb., 95, this court says, in reference to the discretion of the district court to allow or refuse permission to a party to amend his pleadings: "While the entire subject of amendments is in the discretion of the court before which the case is tried, yet it is a legal discretion, and if it should be made to appear to a reviewing court that the

amendment sought to be made of any pleading, process, or proceeding, is in furtherance of justice, it will be held to be error to refuse such amendment." This rule, I suppose, applies also to all matters of discretion which devolve upon the district court in the necessarily hurried transaction of business in the disposition of causes at the sessions, and most obviously so when, upon a matter of discretion, a party may be denied any trial of his cause upon the merits.

It appears that the attention of the court was called to the misunderstanding between counsel almost immediately after the judge's minutes had been entered and the desire of both counsel for defendant to withdraw the consent as having been improvidently made, and it seems quite clear to me that their request should have been granted, the judge's minutes expunged, and the cause restored to the calendar for trial.

While it is true that the policy of the law favors compromises and the amicable settlement of lawsuits, yet it rather favors fair trials than that a party should be led into what he conceives to be an improvident consent to judgment, through the misunderstanding of counsel, in whatever good faith all parties have acted in the premises. And especially when, before the rising of the court from that forenoon's session, and before the cause could have been reached on the docket for trial, it not being suggested that the situation of the parties in reference to a trial had changed in any particular, it is made to appear that such consent was the result of a misunderstanding, and that the party then desires to withdraw it.

While it is almost impossible to lay down any general rule for the government of cases of this kind, the above considerations lead me to the conclusion that under the facts and circumstances of this case, the district court ought to have allowed the motion of the

Burley v. Marsh.

defendant, and that it was a legal abuse of discretion on the part of said court to refuse the same.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

11	291
46	708

ALFRED BURLEY, PLAINTIFF IN ERROR, V. WILLIAM
W. MARSH, DEFENDANT IN ERROR.

1. **Chattel Mortgage: POWER OF CORPORATION: FRAUD.** In order to render a chattel mortgage fraudulent and void as having been given to hinder and delay creditors, there must have been not only a fraudulent intent on the part of the mortgagor, but also on the part of the mortgagee, or the mortgagee must have had notice of the fraudulent intent of the mortgagor. But where the president of a private corporation called a meeting of the board of directors, consisting of two members beside himself, and personally procured the attendance of the other two directors, the object of such meeting being to pass a resolution authorizing said president to mortgage the property of the corporation to himself in his individual capacity, and such resolution was passed, one of said members voting in the negative, the other in the affirmative, and the president deciding the tie; and there being testimony tending to prove that the mortgage executed pursuant to the said resolution was intended by the said president to hinder and delay one of the creditors of said horse railway company, it was *held*, not necessary that there should be other testimony showing also fraudulent intent or notice on the part of the mortgagee; and further that the giving of abstract general principles of law, however correct, yet inapplicable to the proof in the case, undue prominence in the instructions probably misled the jury, and was error.
2. ———: **INSTRUCTIONS.** *Held*, also, that the instructions prayed for by the defendant (plaintiff in error), and refused by the court, and set out in the body of this opinion, should have been given.

ERROR from the district court for Douglas county.
Tried below before SAVAGE, J.

Redick & Connell, for plaintiff in error.

George E. Pritchett, for defendant in error, cited *Gage v. Chesebro*, 5 N. W. Rep., 881. *Hedman v. Anderson*, 6 Neb., 400. *Partelo v. Harris*, 26 Conn., 480. *Steele v. Ward*, 25 Ia., 535. *Brown v. Foree*, 7 B. Mon., 357. *Bryne v. Becker*, 42 Mo., 264. *Foster v. Hill*, 12 Pick., 89. *Bancroft v. Blizzard*, 18 Ohio, 30. *Tagg v. Miller*, 10 Neb., 442. *Weinland v. Cochran*, 9 Neb., 480.

COBB, J.

The defendant in error was a member of the board of directors, and president of the Omaha horse railway company. On the 16th of November, 1877, a special meeting of the board of directors was held, at which were present W. W. Marsh (defendant in error), General Manderson, and J. J. Brown, a quorum of said board. It appears from the record of the proceedings of said meeting as introduced in evidence, and preserved in the bill of exceptions, that "The following resolution was offered: *Resolved*, That the president and secretary be authorized and directed to execute and deliver to W. W. Marsh and Sylvanus Wright a mortgage or mortgages upon such of the real and personal property of the company as the president may think proper to secure the said W. W. Marsh and Sylvanus Wright from any and all loss or damage they may at any time sustain by reason of their having executed as sureties for the company certain promissory notes made by the company. Upon motion, this resolution was adopted by the following vote: Yeas, W. W. Marsh, C. F. Manderson. No, J. J. Brown."

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On the following day, W. W. Marsh (defendant in error) as president, and John E. Wilbur as secretary of the said Omaha horse railway company, executed a chattel mortgage, in and by which they mortgaged to W. W. Marsh certain personal property, which mortgage was recorded the same day, and the principal point involved in the case under consideration is whether the said mortgage was executed, given, and received in good faith, and is entitled to precedence over the levy of an execution on the said goods and chattels, which execution was issued on a judgment rendered against the said Omaha horse railway company a few days after the execution of said mortgage.

Upon the trial, at the request of the plaintiff (defendant in error), the court gave the following instructions to the jury: "The jury are instructed that before they can find a verdict for the defendants, they must find the fact to be that the mortgage was made with the intent to defraud the creditors of the railroad company, and that both the railroad company and the plaintiff acted with that intent at the time the mortgage was given. And it is necessary not only that the railroad company acted with the fraudulent intent, but also that the plaintiff had notice of it. If the plaintiff Marsh had no notice of the fraudulent intent of the railroad company (if such intent existed on the part of the company), this mortgage is valid, it being given to secure a *bona fide* debt." "Before the jury can say that the railroad company acted with the intent to defraud creditors, in giving the mortgage, they must first say that the directors of the railroad company had such intention at the time they authorized the giving of the mortgage, because a corporation can only act through officers, and can have no intention except as the officers have intention."

The court also refused the prayer of the defendant

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(plaintiff in error), to give in charge to the jury the following instructions: "1. In determining whether the object and purpose of executing the chattel mortgage to Mr. Marsh was to defeat the collection of any judgment which might be rendered on the verdict then existing in Mrs. Doolittle's favor, it will be proper for the jury to consider the official relation of Mr. Marsh to the horse railway company, and his interest in the same, and also his knowledge of the fact that such verdict had been returned, and also the fact that said mortgage was executed just after said verdict was returned, and while a motion for new trial was pending, as well also as all other circumstances accompanying and surrounding said transaction. And if from all such circumstances, as shown by the evidence, it appears that Mr. Marsh caused to be executed to himself the said mortgage, to hinder, delay, and prevent the collection of any judgment which might be rendered in Mrs. Doolittle's favor, then it will be your duty to find your verdict in favor of the defendant. Burley represents herein the rights and interest of Mrs. Doolittle."

"2. If from the evidence it appears to your satisfaction that Mr. Marsh was present as a witness at the trial of Mrs. Doolittle's case against the horse railway company, and knew of the verdict in her favor, and before the judgment thereon was rendered, for the purpose of preventing the collection or enforcement of any judgment which might be rendered on the verdict, caused the chattel mortgage to be executed to himself, then would such mortgage be fraudulent and void as against Mrs. Doolittle and her said judgment, and this would be so, notwithstanding such mortgage might have been executed for the additional purpose of securing Mr. Marsh for any debt due to him or liability incurred by him."

"3. That notwithstanding Mr. Marsh has testified

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that the mortgage to him was not executed with the intent or for the purpose of defrauding Mrs. Doolittle, that such testimony is not final on this question. It is for the jury to say, from all the evidence and circumstances surrounding the transaction, whether or not the mortgage was executed for the purpose of preventing or hindering the collection of any judgment which might be rendered on the verdict then already returned by the jury."

"4. If, from such evidence and all the circumstances, it appears that in addition to the purpose of securing Mr. Marsh, it was also his purpose to cover up the property of the horse railway company, to hinder or prevent the enforcement of such judgment, then it would be your duty to find for the defendant."

Gen. Manderson was sworn as a witness on the part of the defendant. I quote his testimony:

Q. It appears from the record that you voted in favor of a resolution to give a mortgage to Marsh from the Omaha horse railway company. Were you a stockholder at the time?

A. No, sir.

Q. How did you come to go there?

A. I went there at the request of Capt. Marsh.

Q. State whether or not that mortgage was executed to Capt. Marsh, according to your understanding, to keep Mrs. Doolittle from collecting her judgment? (Objected to by plaintiff as incompetent. Objection sustained.)

Q. When you voted as director of this corporation at that meeting, did you intend by that act to defeat or defraud any of the creditors of the horse railway company?

A. I certainly did not. I had no interest in it.

The law as expressed in the instructions given, *i.e.*, that in order to make the mortgage fraudulent and

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void, there must have been not only a fraudulent intent on the part of the mortgagor, but also on the part of the mortgagee, or the mortgagee must have had notice of the fraudulent intent of the mortgagor, is no doubt correct, as a general proposition; but I do not think it applicable to the facts, as proved in the case at bar. At the directors' meeting there were but three present. It was a special meeting, called by the president, and the attendance of the other two procured, not only by his official call, but also by his personal solicitation. One of the others voted against the resolution, so we need not inquire into his motives. The third one had sold out his stock; had "no interest in it;" attended the meeting at the request of the president, and no doubt voted for the resolution also at his request. As a matter of fact, as shown by the record, he immediately thereafter resigned as director. When it is borne in mind that Captain Marsh, the president, who called this meeting, procured the attendance of the other two directors, and presided at the meeting, and gave the casting vote, deciding the tie between the other two, one of whom voted in the negative and the other, who, while voting in the affirmative, "had no interest in it," and immediately resigned, is the identical W. W. Marsh, to whom the mortgage was given, its inapplicability will be quite apparent. Furthermore, I think that the undue prominence given to the point involved in the above was calculated to, and probably did, mislead the jury.

The instructions prayed by the defendant and refused, not only present the law, but present it in a manner applicable to the peculiar facts involved in this case, and should have been given.

For these reasons, I think the judgment should be reversed and a new trial awarded.

REVERSED AND REMANDED.

Mansfield v. Gregory.

JOHN M. MANSFIELD, APPELLEE, v. E. MARY GREGORY
AND JOHN S. GREGORY, APPELLANTS.

1. **Real Estate: EQUITABLE OWNER: JUDGMENT CREDITOR.** As between the owner of real estate, evidenced by an unrecorded deed, and a simple judgment creditor of his grantor, the former is to be preferred.
2. ———: ———. The lien of an ordinary judgment on the real estate of the debtor is not specific, but general, and is subject to all prior liens, either legal or equitable.
3. ———: ———. Such lien does not exceed the actual interest of the judgment debtor in the land, and is subject to every equity therein existing against the debtor at the time of its rendition.
4. ———: ———. To defeat the interest of one holding in good faith under an unrecorded deed, it is not enough to show merely that he is a judgment creditor of the grantor in the deed, or even that he is a purchaser under such judgment, but it must appear, in addition, that his lien is evidenced by some instrument, a sheriff's deed, for instance, "required to be recorded," which must be entered of record before such prior conveyance.

APPEAL from the district court for Lancaster county.
Heard below before POUND, J.

John S. Gregory, for appellants.

Lamb, Billingsley & Lambertson, for appellee.

LAKE, J.

The precise questions here presented, with the single exception of that of the sufficiency of the evidence to sustain the findings of fact, were involved and decided by this court in the case of *Mansfield v. Gregory*, 8 Neb., 482. In that case the questions were raised by a demurrer to the petition, and we held, reversing the ruling of the district court, that the facts stated constituted good ground for the relief prayed. In making

11	297
18	442
17	626
11	297
31	824
11	297
30	739
40	750
41	612
11	297
45	671
11	297
48	60
11	297
54	724

that decision the rule frequently applied by this court was enforced, viz., that as between the owner of real estate evidenced by an unrecorded deed, and a simple judgment creditor of his grantor, the former is to be preferred. The lien of an ordinary judgment on the real estate of the debtor is not specific, but general, and is subject to all prior liens, either legal or equitable. *Metz v. The State Bank of Brownville*, 7 Neb., 165. Such lien does not exceed the actual interest of the judgment debtor in the land, and is subject to every equity therein existing against the debtor at the time of its rendition. *Galway et al. v. Mulchow*, Id., 285. And to defeat the interest of one holding in good faith under an unrecorded deed, it is not enough for one to show merely that he is a judgment creditor of the grantor in the deed, or even that he is a purchaser under such judgment, but in addition to this it must appear that his lien is evidenced by some instrument, a sheriff's deed for instance, "required to be recorded," which must be entered of record before such prior conveyance. Id.

In the case now before us, the evidence shows that the deed under which the plaintiff claims the land was made to him in January, 1874. The judgment under which the defendant purchased was not rendered until the November term of the district court of the same year, and the purchase at the execution sale was made two days after the plaintiff's deed was recorded. These facts stand unquestioned, and under the prior rulings of this court, the superiority of the plaintiff's equity over that of the defendant's is conclusively established.

The appellant has indulged in some criticism of the testimony of Mansfield, and his grantor, Ghost, as to the money with which the latter purchased the property in question. While there is some discrepancy between them, which may render it uncertain whether

 Philpott v. Newman.

the money used by Ghost came from Mansfield or from his wife, there is not a particle of doubt that it came from one or the other of those sources, and that Ghost regarded it as belonging to the husband. This point is, however, wholly immaterial in settling the rights of the parties to this action, for the evidence is overwhelming as to the entire good faith of both Ghost and Mansfield in the transaction, and the adjustment of their accounts is a matter which does not now concern us.

JUDGMENT AFFIRMED.

11	299
37	545

JAMES E. PHILPOTT, PLAINTIFF IN ERROR, v. GEORGE C. NEWMAN AND OTHERS, DEFENDANTS IN ERROR.

Attachment: CLAIM BEFORE DUE. An attachment issued by the clerk without an order, on a debt before due, on the sole ground that the defendant is a non-resident of the state, is null and void, and confers no jurisdiction on the court issuing the same.

ERROR from the district court for Lancaster county.
Tried below before POUND, J.

A. L. Palmer and *J. E. Philpott*, for plaintiff in error,
argued the case upon the facts alone.

Lamb, Billingsley, & Lambertson, for defendants in error. The proceedings in attachment are a nullity. Drake on Att., sec. 28. *Kinear v. Shands*, 36 Mo., 379. *Haynes v. Gates*, 2 Head (Tenn.), 598. *Stacey v. Stichton*, 9 Iowa, 399. *Moore v. Dickerson*, 44 Ala., 485. *Dickenson v. Cowley*, 15 Kan., 269. *Davis v. Eppinger*, 18 Cal., 379. *Moore v. Pillow*, 3 Humph., 448. *Webster v. Steele*, 75 Ill., 544. *Young v. Broadbent*, 23 Iowa, 539.

MAXWELL, CH. J.

This is an action by the defendants in error against the plaintiff in error to recover the sum of \$300 collected by him, as the attorney at law and agent of said defendants in error, from J. M. Carter and John Gilmore, being the proceeds of a note signed by them. The answer sets up various defenses, the one principally relied upon is that the plaintiff was garnished in an action pending in the district court of Lancaster county, wherein A. L. Palmer was plaintiff, and R. B. Wasson defendant. The cause was referred to Joseph Hunter to find the issues of law and fact. The referee heard the testimony, and found that the proceedings in garnishment were no defense to the action, and that there was due from this plaintiff to the defendants the sum of \$295 and interest. The plaintiff filed exceptions to the report of the referee, which were overruled, and judgment rendered on the finding. He brings the cause into this court by petition in error.

The proceedings in garnishment are substantially as follows: On the thirtieth of April, 1877, R. B. Wasson bought of J. H. McMurtry, the attorney of Joseph W. Hartley, ten acres of school land near the city of Lincoln, and in payment gave his check for three hundred dollars on the German American Bank of New York, to J. E. Philpott, as his attorney. The certificate for the land had to be sent to Chicago for the signature of Hartley, and certain taxes were to be paid by McMurtry. The money derived from the check to be paid for the land when the terms of the contract were complied with. This check the plaintiff delivered to the bank, which collected the same, and on the fifth day of June, 1877, applied the proceeds in payment for the land, and delivered the title papers to the agent of Wasson. On the fourteenth day of May, 1877, A. L.

Palmer commenced an action by attachment against R. B. Wasson to recover the sum of \$1,000 for an alleged breach of contract, it being alleged in the petition that Wasson purchased Palmer's residence in Lancaster county for the sum of \$7,000, \$100 cash in hand, \$3,000 to be paid in thirty days from the third day of May, 1877, and \$3,900 to be paid in sixty days from that date. The affidavit for an attachment is based solely on the ground that Wasson is a non-resident of the state. No order allowing the attachment was made, and no undertaking given. The plaintiff herein was served with notice of garnishment on the fourteenth of May, 1877, and filed his answer on the twenty-seventh of May, 1878, and the court thereupon made an order requiring him to hold the money in his hands. Wasson has made no appearance in that action, and if the court has acquired jurisdiction it is by virtue of the proceedings in attachment.

Section 237 of the civil code provides that "a creditor may bring an action on a claim before it is due, and have an attachment against the property of the debtor, in the following cases :

"*First.* Where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts.

"*Second.* Where he is about to make such sale, conveyance, or disposition of his property, with such fraudulent intent.

"*Third.* Where he is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering and delaying them in the collection of their debts."

Section 238 provides that the attachment may be granted by the court in which the action is brought,

or a judge thereof, or by the county judge of the county.

Section 239 provides that "if the court or judge refuse to grant an order of attachment, the action shall be dismissed," etc.

It is also provided that the court or judge shall fix the amount of the undertaking. All of these requirements have been disregarded. If the claim is one upon which an attachment would be issued in a proper case—which is not before us—the petition and affidavit show on their face that there could be no breach of the conditions of the contract until thirty days from the 8d day of May, and also show that there has been no breach of the conditions, and that nothing was in fact due, notwithstanding an allegation to the contrary. Proceedings in attachment are regulated by statute, and there must be a substantial compliance therewith, to give them validity. The plaintiff in error does not seem to have been wholly averse to this attachment; but the court acquired no jurisdiction by his answer as garnishee. The findings of the referee have been carefully prepared, are fully sustained by the testimony, and the judgment of the court below is in all things affirmed.

JUDGMENT AFFIRMED.

COBB, J., having been counsel, did not sit in the case.

THE STATE BANK OF NEBRASKA, APPELLEE, V. JOHN H.
GREEN AND JOHN I. REDICK, FOR APPELLANTS.

1. **Judicial Sale: MOTION TO VACATE: PRACTICE.** A motion to vacate a sale of real estate on execution, on the ground that it was concealed from the defendant, should be accompanied by a statement of the facts of the alleged concealment.
2. ———: ———. The fact that after the setting aside of a prior sale, the plaintiff took leave to file a supplemental petition within a time limited, which he failed to do, and by reason of which the defendants were, as they alleged, led to believe that no re-sale would be had, but which, after the time for filing said pleading had expired, actually took place without their knowledge, is not a sufficient reason for setting the sale aside.
3. ———: **PENDENCY OF ANOTHER ACTION.** Neither is the pendency of an action at law for the recovery of the mortgage debt any reason why such sale should be set aside.
4. ———: **APPRAISEMENT OF LAND LYING IN TWO COUNTIES.** In a sale by a sheriff, under a decree of foreclosure, of a single tract of land lying in two counties, he must call, as appraisers, freeholders residing in the county where the decree was rendered.
5. ———: **RE-APPRAISEMENT.** Land having been legally appraised at a prior sale which was set aside, and a second sale made with regard to that appraisal, it was urged in resistance of a confirmation that the premises had been improved to the extent of \$4,000 between the time of the appraisal and the second sale. But it being shown that such improvement was actually made at the expense of the plaintiff, who was the purchaser at both sales, while holding under the first, *Held*, That this was not a valid objection to the second sale, no new appraisal being necessary or proper under the circumstances.
6. ———: **OFFER OF INCREASED BID.** Where a sale of land by a sheriff is in all respects fairly and legally made, an offer of an increased bid, on behalf of the defendant, in case a re-sale is ordered, is not sufficient absolutely to require the court to set the sale aside. It is a matter of discretion with the court to which the offer is made to accept it or not, and unless an abuse of such discretion be clearly shown, an appellate court has no right to interfere.

APPEAL by defendants from an order of confirmation rendered by SAVAGE, J., in an action tried in the district court for Washington county. See 8 Neb., 297, and 9 Neb., 165.

J. M. Woolworth, Redick & Redick, and Albert Swartzlander, for appellants, cited *Duncan v. Dodd*, 2 Paige, 99. *Blackburn v. S. R. Co.*, 3 Fed. Rep., 689. Rorer on Judicial sales, 163.

George E. Pritchett (*George W. Doane* with him), for appellee, cited Rorer on Judicial sales, secs. 108, 585. *Paulett v. Peabody*, 3 Neb., 196. *La Flume v. Jones*, 5 Neb., 256. *Rosenfield v. Chada*, 10 Neb., 421. Code, sec. 52. *Wiley v. Angel*, Clarke, 217. *Gardner v. Schermerhorn*, Id., 101. *Buffalo Savings Bank v. Newton*, 23 N. Y., 160. *McCotter v. Jay*, 30 N. Y., 80.

LAKE, J.

This is an appeal from an order confirming a sale of real estate under a decree of foreclosure. Several objections to the sale were made in the district court, but we shall refer only to those mentioned and relied on by counsel in their brief filed here.

The first of these objections is one made by the defendant Green, that the sale was concealed from him. This charge implies that some act was either done or omitted, by the plaintiff, its attorney, or the sheriff in making the sale, to which the defendant had the right to look for information as to when it would take place. In the first place, it may be said of this objection that it is wanting in particularity. It points to no act done or omitted by which the defendant was deprived of the full benefit of the notice which the law provides shall be given of such sale. And the evidence relied on to

sustain it is equally defective. The notice was published the full time required by the statute, and even if it failed to reach the defendant, through no fault of the plaintiff, or its counsel, or the sheriff, this is not an adequate reason for setting the sale aside. Under this head, the defendants urge that subsequently to the setting aside of a former sale of these premises, in the same proceeding, the plaintiff took leave to file a supplemental petition, and had also commenced an action at law in another county to recover from them the amount of the mortgage debt, whereby they were led to believe, as they say, that no immediate sale was contemplated or would be attempted. This inference from these facts was not warranted. It appears that in the order granting leave to file a supplemental petition, a time was named within which it must be done, if done at all, and this time had fully passed before the order of sale went out. Of this order to file a supplemental petition the defendants had due notice, and while they might properly have inferred from it that no sale under the existing decree would be attempted up to the time limited for filing the supplemental petition, they could not afterwards do so. After the expiration of the time fixed in the order, the only justifiable inference to be drawn was that the proposed amendment had been abandoned, inasmuch as it could not be made afterwards without an additional order, or by consent of parties defendant. As to the pendency of the action at law, surely that furnished no excuse for inattention to the pending proceeding in equity.

The next point urged is that the premises were not legally appraised. This sale was made under an order issued by the clerk of the court, bearing date of July 9th, 1880, and with regard to an appraisement of the premises made September 4th, 1877, in making the prior sale, before referred to, under the same decree.

In this connection it is said that "The appraisers were not sworn to appraise the interest of Green, and did not appraise his interest as a matter of fact." The record, however, discloses that the oath administered was, "impartially to appraise the interest of John H. Green and John L. Redick, defendants, in said lands and tenements, upon actual view thereof." As to the appraisement itself, the return shows that the "160 acres of land, together with all the appurtenances thereunto belonging," were "valued at the sum of three thousand dollars." It further shows that the sheriff took proper steps and ascertained that the prior incumbrances upon the premises consisted solely of, "taxes, as per county treasurer's certificate, \$497.32." This sum was deducted from the gross valuation, and \$2,502.68 returned by the appraisers as the value of the defendant's interest in the property. This was all in exact conformity with the requirements of the act of 1875, "For the more equitable appraisement of property under judicial sale." Laws 1875, 60.

But even if the oath and appraisement had been as claimed by the defendant's counsel, that would not necessarily vitiate the sale made under it, as we held in *LaFlume v. Jones*, 5 Neb., 256, and for the reasons there stated.

It is further claimed that this appraisement was bad because a portion of the land was in Dodge county, whereas the appraisers were residents of Washington county, where the decree was rendered. There is no merit in this objection. The premises covered by the mortgage were conveyed, and have been treated by the parties throughout the entire case as a single tract. No suggestion appears to have been made at the hearing that a sale by parcels would be at all advantageous or even proper. In the decree no such direction was given, but the sheriff was left to pursue the usual course where

the premises are described as a single tract, viz.: to sell them altogether. The suggestion of a division of the tract in making the sale is first heard in resisting the motion to confirm. Under these circumstances it would require a very strong showing indeed of injurious results from selling it as one body to justify the court in ordering a re-sale.

Although the land is situated in two counties—Washington and Dodge—the action was properly brought in the former to foreclose as to the entire tract. Sec. 52 of the code of civil procedure provides that: “If real property, the subject of the action, be an entire tract, and situated in two or more counties, or if it consist of separate tracts situated in two or more counties, the action may be brought in any county in which any tract or part thereof is situated, unless it be an action to recover the possession thereof.” And even the possession of an *entire tract* so situated may be recovered in a single action in either of the counties. In respect to land situated as is that in question, the obvious effect of this statute is to bring the whole of it within the jurisdiction of the court *for all the purposes of the action*, and to enable the court to deal with it in all respects precisely the same as if it all lay in the county where the suit was commenced. Therefore the sheriff of Washington county could lawfully make the sale, and in making the required appraisement it was his duty to call to his aid freeholders residing therein. We are of opinion that the appraisement was legally and fairly made.

But it is said that at least a new appraisement should have been made, for the reason that between the time of its valuation and final sale “the property was improved to the extent of \$4,000.” If this were so, and by reason thereof the defendants were liable to be prejudiced, had the matter been brought to the atten-

tion of the court by proper motion, before the sale was made, doubtless the appraisal on file would have been vacated and a new one ordered. This course, however, was not pursued, and it is exceedingly doubtful whether the sheriff would have been justified, of his own motion, in disregarding the appraisal already made in that proceeding, and in putting the parties to the expense of a new one.

And of this \$4,000 improvement it may be properly said that the facts concerning it are far from favorable to this claim of the defendants that they should profit thereby. The plaintiff was purchaser at both sales. It appears that after the former sale had been confirmed by the district court, the bank sold the premises by contract to one Thomas H. Lee, who spent at least \$3,500 in valuable improvements. That sale was afterwards set aside by this court—*Green v. State Bank*, 9 Neb., 165—and the bank was thereupon compelled to reimburse Lee for the money he had thus put into the property. In fact, therefore, the expense of the improvements was borne entirely by the plaintiff, and this is the basis of the claim we are now considering. Should a re-sale be ordered on the strength of it, we apprehend there would be no small difficulty in pointing to its equity as between these parties.

As to Redick's offer to bid \$3500.00 on a re-sale, that was properly rejected by the district judge as a ground for setting the sale aside. In the first place, even if the offer had been amply assured, the forms of the law having been fully complied with in making the sale, it was a matter of discretion with the court to which the offer is made to accept it or not. *The Buffalo Savings Bank v. Newton*, 23 N. Y., 160. *Wakeman v. Price*, 3 Comstock, 334. And unless an abuse of such discretion be clearly shown, an appellate court has no right to interfere. But the bond accompanying

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the offer was no security that the proposed bid would be made good by a payment of the money; and besides, there was no offer to reimburse the bank for the costs and expenses of the present sale, which should always be required. *Duncan v. Dodd*, 2 Paige Ch., 99.

As to the offer made by Redick in this court to give such additional security as we might be pleased to require, that will not be considered. It is possible that a case might be presented of so great wrong in a sale that we would feel warranted in permitting a party to thus reinforce his demand after bringing it here, but we discover nothing to justify such a course in this one, and must decide it upon the facts presented to the court below, as shown by the record.

ORDER AFFIRMED.

EX PARTE THOMAS B. PARKER AND THOMAS SAWYER.

False Pretense: JURISDICTION OF POLICE COURT. P. and S. resided and did business in Saline county. The traveling salesman of merchants in Douglas county sold them a bill of goods. The order of purchase was verbal. There was no written contract signed by P. and S. The evidence showed delivery of the goods to a railroad for conveyance to P. and S., but did not show that they accepted or received the same, or paid any part of the purchase money. They were arrested upon a warrant issued by a police court in Douglas county, under a complaint of obtaining property under "false pretenses." On *habeas corpus*, held, 1. That the contract of purchase being void under the statute of frauds, a delivery of the goods to the railroad was not a delivery to P. and S. 2. That under the evidence the police court of Douglas county had no jurisdiction of the alleged offense.

ORIGINAL application for writ of *habeas corpus*.

11	309
38	349
11	309
51	896

Ex parte Parker.

Hastings & McGintie, and E. F. Smythe, for relator.

Groff & Montgomery, and John C. Cowin, for respondent.

COBB, J.

This case was submitted to the court chiefly upon the question of jurisdiction in the committing magistrate. The case was heard upon the evidence taken before him, no application for additional testimony being made by either party, and the magistrate having returned and certified all the testimony taken before him.

Does this testimony establish *prima facie* the guilt of the petitioners, or either of them, of the offense charged within the county of Douglas?

The offense with which the petitioners are charged is set out in the statute in the following words:

"If any person, by false pretense or pretenses, shall obtain from any other person any money, goods, merchandise, or effects whatever, with intent to cheat and defraud such persons of the same," etc. 1875, 9.

The complaint charges that the petitioners "on the 19th day of March, A.D. 1880, in the county of Douglas and within the city limits of the city of Omaha, Nebraska, unlawfully, wilfully, and feloniously, did falsely pretend to the complainant, Freeman P. Keykendall, who is a member of a firm doing business in the city of Omaha, under the firm name of Reed, Jones & Co.,

* * that they, the said T. B. Parker and Thomas Sawyer, were * * the owners and possessors, free from incumbrance, of the following described personal property situate and being in Dorchester, in the county of Saline, in the state of Nebraska, to-wit: Thirty thousand bushels of corn, of the value of six thousand dollars, and the cribs in which said corn was deposited, of the

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value of five hundred dollars; and that the said T. B. Parker * * and Thomas Sawyer were the owners, free from incumbrance, of a stock of merchandise in their store in said Dorchester, county and state aforesaid, of the value of four thousand dollars, and that they, the said T. B. Parker and Thomas Sawyer, were worth, jointly and severally, the sum of eighteen thousand dollars over and above all of their joint and several liabilities; with the felonious intent then and there to cheat and defraud the said firm of Reed, Jones & Co., and all the members thereof, and by means of said false pretense and pretenses they, the said T. B. Parker * * and Thomas Sawyer, unlawfully, wilfully, and feloniously, then and there did obtain from the said William P. Reed, Ellis O. Jones, and Freeman P. Keykendall, comprising the firm of Reed, Jones & Co., the following described goods and merchandise, to-wit: * * * of the total value of seven hundred and twenty-eight dollars and seventy-two cents, of the goods, chattels, merchandise, and property of the said William P. Reed, Ellis O. Jones, and Freeman P. Keykendall * * with the felonious intent then and there unlawfully, wilfully, and feloniously to cheat and defraud the said * * Reed, Jones & Co. of the goods, chattels, merchandise, and property aforesaid; whereas, in truth and in fact, the said T. B. Parker * * and Thomas Sawyer, at the time and times aforesaid, did not own said corn, or any part thereof, nor the cribs, or any part thereof, and whereas, in truth and in fact, the said T. B. Parker * * and Thomas Sawyer, at the time and times aforesaid, did not have the stock of merchandise, as by them represented, of the value of four thousand dollars, but in truth and in fact the said stock of goods and merchandise was of the value of twenty-five hundred dollars, and no more; and whereas, in truth and

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in fact, the said T. B. Parker and Thomas Sawyer are not jointly and severally worth the sum of eighteen thousand dollars over and above their joint and several liabilities, nor of any sum or amount whatever. And the said T. B. Parker * * and Thomas Sawyer, at the time they so falsely pretended, as aforesaid, well knew the said pretense and pretenses to be fraudulent and false," etc.

The testimony is to the effect that on the 14th of January, 1880, William Fisher, the traveling salesman of Reed, Jones & Co., wholesale merchants of Omaha, Douglas county, called at the store of Parker & Sawyer (petitioners), at Dorchester, Saline county. He found Mr. Sawyer in the store, and had a general conversation with him, in which Mr. Sawyer made representations as to the business and means of the firm, which are claimed to have been false and made with intent to defraud, but which it is not deemed necessary to set out at length in this opinion. In the course of the conversation Fisher informed Sawyer that he had samples open at the hotel, and invited him over there. He went, and after examining the samples, gave Fisher an order for goods amounting to over eight hundred dollars. This order was a verbal one, so far as Sawyer or Parker & Sawyer were concerned, was reduced to writing by Fisher, and by him forwarded to the house at Omaha. These goods were not to be actually ready for delivery until the following March. There is no testimony as to anything having been said as to the place of delivery, or the means or line by which the same were to be shipped or delivered. There is testimony as to representations, which are claimed to be false and fraudulent, having been made by the petitioners, or one of them, to Mr. Koch, traveling salesman for another firm, who communicated the same to Reed, Jones & Co.; also of

Ex parte Parker.

similar representations made by them to Mr. Montgomery, the attorney of R., J. & Co., who went to Dorchester for the special purpose of ascertaining the financial condition of the petitioners. Upon the return of the latter to Omaha, and his report being made to R., J. & Co., they shipped (March 19), upon the said order forwarded to them by their traveling salesman, Fisher, in the month of January preceding, goods to the amount of \$728.72, by the Burlington and Missouri River Railroad in Nebraska, consigned to Parker & Sawyer, Dorchester, Nebraska. There is also testimony tending to prove that the representations made by Sawyer to Fisher at the time of the giving of the order for the goods, as well as those made by him at a subsequent date to Mr. Koch, and those made by both Parker and Sawyer, at a subsequent date, to Mr. Montgomery, were false. Also testimony tending to prove that some time in July, 1880, the petitioners sold out their business at Dorchester, and did not pay their debts.

The primary definition of the word obtain, as given by Webster, is "to get hold of by effort." The section of the statute under which the petitioners were committed is almost a literal copy of the corresponding section of 30 Geo. II, Chap. 24, which has been held to reach almost every species of gross fraud by means of which the unsuspecting and over confident have been cheated out of money or goods. Yet I think that in the very nature of things there is a difference between those frauds which are perpetrated by means of the abuse of the forms of legitimate commercial transactions and those which consist of personations and so-called confidence games and tricks. In either case and by whatever means accomplished, the crime consists in the obtaining of the property—getting hold of the property, that is the *corpus delicti*.

Ex parte Parker.

So far as the testimony in this case proves a contract for the purchase and sale of the goods in question, it was a contract within the statute of frauds. The value and price of the goods exceeded fifty dollars. There was no note or memorandum of such contract made in writing and subscribed by the party to be charged thereby, nor did the buyer accept or receive the goods or any part thereof, nor did they pay any part of the purchase money. There is proof that the goods were delivered by Reed, Jones & Co. to the agent of the railroad to be conveyed to the petitioners at Dorchester, and it was urged at the hearing that such delivery was a delivery in legal effect to the petitioners, and so completed and gave locality—venue—to the offense. Such no doubt would be the case had the contract been such as to vest the legal title in the purchasers. But the contract being void within the statute of frauds a delivery to the railroad agent was no delivery to the consignees.

Calkins et al. v. Hellman, 47 N. Y., 449, is directly in point. In that case the court say, "No act of the vendor alone in performance of a contract void by the statute of frauds can give validity to such a contract," and again, "where a valid contract of sale is made in writing, a delivery pursuant to such contract at the place agreed upon for delivery, or a shipment of the goods in conformity with the terms of the contract, will pass the title to the vendee without any receipt or acceptance of the goods by him. But if the contract is oral, and no part of the price is paid by the vendee, there must be not only a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee to pass the title or make the vendee liable for the price."

Now if, waiving the fraud, the facts proved would be insufficient to render the petitioners liable for the price

Ex parte Parker.

of the goods, it seems to me quite clear that such facts must be held insufficient when coupled with the alleged false and fraudulent pretenses to establish the charge preferred against them. It seems almost unnecessary to argue where a thing has not been obtained at all, that it has not been obtained by false pretenses.

Were there proof of the receipt of the goods at Dorchester, and their acceptance at that place by the petitioners, such acceptance would not only have made legal a transaction which up to that point was void under the statute, but would also, such purchase having been effected by means of false pretenses, have given venue to the offense and jurisdiction to try it to the district court of Saline county.

But on the other hand, let us examine the question without reference to the statute, discarding all presumptions and legal conclusions. Is there any evidence tending to prove that these men obtained the goods in Douglas county? They indicated the kind and quantity which they wished to buy, and in that manner induced Fisher to order them; which in every other view than that of the statute of frauds, was equivalent to ordering them themselves. Set in motion by these means the goods may be followed to the freight office of the railroad. Beyond that there is "no thoroughfare." Even were we now dealing with presumptions of law it would not be contended that the law raises any presumption that goods shipped by railroad at one point are delivered to a given person at another. And when it is borne in mind that we are considering a question of crime, that these goods have been set in motion by means of false pretenses, the one hundred miles and more between the railroad freight office at Omaha and the store of the petitioners at Dorchester must be considered a *locus penitentiae*, within which even the unconscious wheels of commerce might have re-

fused to revolve as accessories to crime, and thus this well laid scheme of fraud fall short of fruition.

No doubt the reason why the state failed to introduce any evidence tending to prove the receipt of the goods at Dorchester or their acceptance by the petitioners, supposing for the sake of the statement that such proof could have been obtained, was that by such evidence it would be established that the goods were obtained by the petitioners at their home at Dorchester and not at the railroad office at Omaha. But in a criminal case where all the presumptions are in favor of the innocence of the accused, it will not do to stop short of proving the body of the crime. It is true that, for all that appears in the proofs, the goods never left the city of Omaha, and it is equally true that, for all that appears in the proofs, the petitioners never obtained the goods, never "got hold of them" either by false pretenses or otherwise, either at one place or the other.

No case being made against the petitioners it follows that they must be discharged.

JUDGMENT ACCORDINGLY.

LAKE, J., dissented.

11	316
16	346

GEORGE P. UHL, PLAINTIFF IN ERROR, v. J. M. PENCE,
DEFENDANT IN ERROR.

1. **Forcible Entry and Detention:** JURISDICTION OF COUNTY COURT. County judges have jurisdiction of actions for the forcible entry and detention of real property.
2. **Landlord and Tenant:** TENANCY AT WILL. G. B. U. being in possession of a house which he claimed as owner, sold the same on credit to F. H. R., gave him a title bond therefor, and

Uhl v. Pence.

put him in possession. R. remained in possession until the last installment became due, never paid anything on the property, but disappeared, and J. M. P. was found in possession. *Held*, That *prima facie* G. P. U. was entitled to a judgment for the possession of the house.

ERROR to the district court for Richardson county.
Tried below by WEAVER, J.

George P. Uhl, pro se.

Reavis & Thomas and Clarence Gillespie for defendant
in error.

COBB, J.

The plaintiff in error was the owner of lots three and four, in block sixty-five, in Falls City, and was also the owner of a house situated on lots one and two in the same block, and on the 5th day of May, 1873, he sold said property, to-wit: said lots three and four, and the house standing on lots one and two, to F. H. Raw for one hundred and sixty-eight dollars, payable in installments of twenty-four dollars each, payable, with ten per cent interest respectively, in seven, ten, twelve, fifteen, eighteen, twenty-one, and twenty-four months, and executed and delivered to the said Raw a bond in the penalty of four hundred dollars to convey said property to Katherine Raw, wife of said F. H. Raw, upon the prompt payment of said several sums and interest at the said several dates respectively, and providing that if the said F. H. Raw should fail in making prompt payment of said sums of money as the same should become due as therein provided, then the said sale should be void and of no effect, and all the property thereby intended to be conveyed and all improvements thereon should be and remain in the said Geo. P. Uhl.

In this bond nothing is said about the possession of the property during the time which the notes had to run, but the plaintiff in error, who was sworn as a witness at the trial on his own behalf, testified that on the twenty-fifth of March, 1873, he put the said Raw in possession, and that he remained in possession from that time until the twenty-fifth or twenty-sixth day of September, 1879, when he vacated the premises, and the defendant in error was found in possession. Thereupon plaintiff in error notified defendant in error to quit the premises, and soon after commenced proceedings against him before the county judge in forcible entry and detention. In the notice and complaint the property is described as "the house and lots Nos. one and two in block 65," etc.

Upon the trial the plaintiff in error testified, as hereinbefore stated, in his own behalf, also that the said F. H. Raw never paid any part of the purchase money for said premises, and that he—the affiant—was then the owner and holder of the said notes. He also offered to testify that at the time he sold the said premises to the said Raw he "owned" them, which upon objection was ruled out. He also introduced the title bond to said Raw, hereinbefore described. He also offered a decree of the district court of Richardson county in a certain action then pending in said court, wherein George P. Uhl was plaintiff, and F. H. Raw, Kate Raw, F. M. Dorrington, and John F. Harkendorff were defendants, and in and by which decree, as against the defendants F. H. Raw and Kate Raw, the court decreed the title in and to "the house and building on lots one and two, and lots three and four in block 65," etc., to be in the plaintiff, which offer was on objection rejected. The plaintiff also called the defendant J. M. Pence, who testified that he was in the possession of the premises, and that he did not get the possession

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through the plaintiff. He also admitted that F. H. Raw obtained the possession of said premises solely and only by virtue of the title bond offered in evidence.

Whereupon the plaintiff rested, and on motion the court dismissed the cause for want of sufficient testimony to put the defendant upon his defense.

The plaintiff then took the cause to the district court, where the same was dismissed by the said court finding that the said county judge had no power, under the statute, to take jurisdiction in this cause. And thereupon the cause comes to this court on petition in error.

This court has held in the case of *Blaco v. Haller*, 9 Neb., 149, that county courts have jurisdiction in actions of this character. So that so far as that point is concerned there can be no doubt that the district court erred in dismissing the case, and yet unless the plaintiff had made out a case on the merits, the judgment cannot be disturbed.

The proof is clear that the plaintiff was in possession of the house in question, claiming to be owner of it, in 1873, at which time he sold it on credit to Raw, giving a title bond therefor, and put him in possession. Raw occupied the premises under said sale and title bond for five or six years, never paying any part of the purchase money, when he disappears and the defendant is found in possession.

Under the facts proved, upon the entire failure of Raw to pay the purchase money according to the terms of the title bond, he became the tenant at will of the plaintiff. Being such, he could not have put the defendant in legal possession. His attempt to do so would have terminated his own tenancy without advantage to the defendant. But defendant in his testimony admitted that he did not get the possession of the premises through the said Raw.

Conceding that plaintiff was in the legal possession

Pence v. Uhl.

of the premises at the time he let Raw into possession, then it appears *prima facie* from the proof that he was entitled to the possession upon the termination of Raw's tenancy at will, by whatever means. True there may be an outstanding paramount title under which the defendant holds, but that will not be presumed, but must be shown even in this class of cases, either by pleading, or proof, or both.

I therefore come to the conclusion that the district court erred in dismissing the cause, and that such judgment must be reversed and the cause remanded for further proceedings

REVERSED AND REMANDED.

9-46

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J. M. PENCE, PLAINTIFF IN ERROR, v. GEORGE P. UHL,
DEFENDANT IN ERROR.

1. **Former Suit in Bar.** Action of forcible entry and detention. Answer, former suit in bar. Evidence—suit between the same parties for the forcible entry and detention of the same property in the county court. Judgment of non-suit. Cause taken to the district court, on error, by the plaintiff. Judgment of the district court that the county court had no jurisdiction of the action. *Held*, no bar to the present action.
2. **Abuse of Discretion.** After defendant had rested his case, he applied to the justice for leave to withdraw his rest, for the purpose of showing "how Pence came into possession, that Pence holds under Dorrington, and that Dorrington has deed to land from Lowe, and Dorrington bought house from Raw." Application refused. In the light of the facts in the case, *held*, no abuse of discretion.

ERROR from the district court for Richardson county.
Tried below before WEAVER, J.

Reavis & Thomas and Clarence Gillespie, for plaintiff in error.

George P. Uhl, *pro se*.

COBB, J.

This action was originally brought before a justice of the peace, by the defendant in error, and seems to be a continuation of the litigation involved in the cause between the same parties decided at the present term.

Complaint for the forcible entry and detention of lots one and two in block sixty-five, in Falls City, etc. Answer, not guilty, and further setting up former adjudication of all questions which could arise in case at bar, in an action then lately tried in the county court of Richardson county, between the same parties plaintiff and defendant. And also setting up the statute of limitations.

Trial, and judgment for the plaintiff. Error to the district court, where the judgment was affirmed; to correct which latter judgment the cause is brought to this court on error.

The petition in error presents substantially but two points: 1st. Was the former adjudication set up in the answer a bar to the second action? And, 2d, Was it an abuse of discretion on the part of the justice to refuse to allow the defendant below to withdraw his rest, for the purpose of showing "how Pence came into possession; that Pence holds under Dorrington, and that Dorrington has deed to land from Lowe, and Dorrington bought house from Raw."

As to the first point, the record introduced in evidence and preserved in the bill of exceptions, shows that in the suit which is here pled in bar, the plaintiff

was non-suited in the county court, which judgment of non-suit was taken to the district court, and that the district court disposed of the same by a judgment that the county court had no jurisdiction of the cause. This record did not show a final decision of the matter in dispute on the merits, but only showed a futile attempt to litigate the same, and was no bar to a subsequent suit.

As to the second point: It is a matter within the discretion of a court whether it will allow a party who has closed his case to withdraw his rest and introduce additional testimony. But in all matters of discretion, the same should be fairly, and neither unreasonably or oppressively, used; and this court would not hesitate to hold a gross abuse of discretion to be reversible error, in a proper case. In this case, the object of the defendant in asking leave to withdraw his rest was to introduce testimony to show that Pence held possession under Dorrington, that Dorrington had a deed to the lots from one Lowe, and had bought the house from Raw; and although the request in this shape was denied, yet when renewed in a somewhat different form, it was granted, and all the testimony let in which probably could have been produced had the request been granted in its original form. This testimony was ineffectual, for the reason that it was not claimed that Pence's possession could be traced back to anybody who had the right of possession as against the plaintiff Uhl. This was a possessory action. It had nothing to do with titles. And where titles are relied upon to establish the right to possess real estate, resort must be had not only to another tribunal but also to a different form of action.

Thus viewing the law of this case, I do not think that the justice was guilty of any abuse of discretion in refusing the request of the defendant below to with-

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draw his rest for the purpose indicated. Nor do I think there is any error in the record calling for a reversal of the judgment of the district court. It must therefore be affirmed.

JUDGMENT AFFIRMED.

OLIVIA T. SAVAGE, APPELLANT, v. ASHBEL P. HAZARD
AND JONAS B. AIKEN, APPELLEES.

1. **Fraud.** One C. A. S., being in embarrassed circumstances, conveyed certain real estate to his brother, W. T. S., for an expressed consideration of \$10,000.00, taking his notes therefor, the object being to delay and defraud creditors of which W. T. S. had knowledge. A creditor of C. A. S. thereupon attached the land, and after judgment purchased the same at judicial sale as the property of C. A. S., and obtained a sheriff's deed therefor. W. T. S., while the action was pending conveyed to the wife of C. A. S., taking her notes for ten thousand dollars. In an action by the wife against the purchaser to quiet title, *Held*, that W. T. S. was not a bona fide purchaser, neither was the plaintiff, and affirmative relief was granted to the defendant.
2. **Bona fide Purchase.** To constitute a bona fide purchase it must be made without notice and with the money actually paid.

APPEAL from Gage county. Tried below before
WEAVER, J.

E. Wakeley (with *Hale & Hardy*) for appellant. The conveyance from Charles A. to William T. Savage was not fraudulent as to creditors. *Felton v. Dickinson*, 10 Mass., 287. *Brewer v. Dyer*, 7 Cush., 337. *Carnegie v. Morrison*, 2 Met., 381. *Barker v. Bucklin*, 2 Den., 45. *D. & H. Canal Co. v. Bank*, 4 Den., 97. *Burr v. Beers*, 24 N.Y., 178. *Bealls v. Bealls*, 20. Ind.,

11	323
15	289
18	477
23	352
11	333
26	359
11	323
34	338
29	678
11	333
37	821
11	323
47	671
11	323
50	664
52	372
11	323
57	290
11	323
61	240

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163. *Allen v. Thomas*, 3 Met. (Ky.), 198. *Bohanan v. Pope*, 42 Me., 98. *Crocker v. Higgins*, 7 Conn., 342 (347.) *Thompson v. Gordon*, 8 Strob. (S. C.), 196. *Lucas v. Chamberlain*, 8 B. Mon., 276. *Beers v. Robinson*, 9 Barr., 229. *Dearborn v. Parks*, 5 Greenl., 31. *Jackson v. Hoffman*, 9 Cow., 271. *Johnson v. Gilbert*, 4 Hill, 178. *Crown v. Curtis*, 2 Conn., 225. *Barker v. Bucklin*, 2 Den., 45. *Smith v. Finch*, 2 Scam., 321. *Jones v. Palmer*, 1 Doug., 370. *Thompson v. Gordon*, 8 Strob. (S. C.), 196. *Cordell v. McNiell*, 21 N. Y., 336. *Pike v. Brown*, 7 Cush., 188. *Haydon v. Christopher*, 1 J. J. Marsh, 382. *Robbins v. Byers*, 10 Mo., 588. *Maxwell v. Harris*, 41 Me., 559. *Barringer v. Warden*, 12 Cal., 311. *Kutzmyer v. Ennis*, 27 N. J. (L.), 371. The notice in the attachment proceedings commenced by Aiken was insufficient to give court jurisdiction and Aiken any title. It was not published four consecutive weeks. First insertion July 27, 1876, the fourth and last, Aug. 14, 1876, being only 18 days. *Atkins v. Atkins*, 9 Neb., 191, and cases cited. *Webster v. Reid*, 11 How., 437. *Rape v. Heaton*, 9 Wis., 328. *Northrop v. Shepard*, 23 Wis., 513. *Senichka v. Lowe*, 74 Ill., 274. *Faulkner v. Guild*, 10 Wis., 569. *Pollard v. Wegener*, 13 Wis., 569. *Claypool v. Houston*, 12 Kan., 321. *McMerrin v. Whelan*, 27 Cal., 300. *Shields v. Miller*, 9 Kan., 390. *Boyland v. Boyland*, 18 Ill., 552. *Brownfield v. Dyer*, 7 Bush., 505.

Colby & Hazlett (A. J. Poppleton with them) for appellees. The conveyance to William T. Savage was fraudulent, and the burden of proof is on the donee to repel the presumption of fraud. Bump. on Fraud. Conv. and cases collated on pp. 259, 270, also *Johnson v. Dick*, 27 Miss., 277. *Weisiger v. Chrisholm*, 28 Tex., 790. *Butler v. Breck*, 7 Me., 166. *Gillitte v. Phelps*, 12 Wis., 393. *Merrile v. Lock*, 41 N. H., 491.

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Purkett & Polark, 17 Cal., 332. *Ferguson v. Gilbert*, 16 Ohio St., 88. *Jones v. Taylor*, 2 Atk., 600. Bump. Fraud. Conv. 95, 96. Mrs. Savage took with notice. G. S., 536, secs. 79, 80, 85. *Bennett's Lessee v. Williams*, 5 Ohio, 461. Wade on Notice, § 348 p. 151. The notice of publication was sufficient. The affidavit of the publisher shows that it "was published in said newspaper in said county four consecutive weeks, and four times once in each week; that said fourth publication of said notice and said fourth consecutive week of said four consecutive publications, was made and completed on the 14th day of August, A.D. 1876." The first publication was made on the 27th day of July. The statute does not require four weeks' notice. A publication of the notice in four consecutive weeks is what is required. It is no objection to the publication of the notice that four full weeks did not elapse between the first and last days of publication, or that a period longer or shorter than seven days intervened between the successive issues of the paper. *Olcott v. Robinson*, 21 N. Y., 150. *Rockendorf v. Taylor's lessee*, 4 Pet., 349. *Bachelor v. Bachelor*, 1 Mass., 256. *Pier-son v. Bradley*, 48 Ill., 250. *Cass v. Bellows*, 81 N. H., 501. *Sheldon v. Wright*, 5 N. Y., 497. Wade on Notice, sec. 1076, 77, 78, 79, 1101. Maxwell's Pl. and Pr., 51.

MAXWELL, CH. J.

This is an action to quiet title. It appears from the record that on the 21st day of July, 1876, the defendant herein, Jonas B. Aiken, commenced an action by attachment, in the district court of Gage county, against Charles A. Savage, to recover the sum of \$11,000 and interest, and on the 24th of that month caused certain real estate situate in Gage county to be

levied on under the attachment as the property of Charles A. Savage. Service was had by publication, and on the 20th of December, 1876, judgment by default was taken against Savage for the sum of \$11,308, and the property attached was ordered sold. A sale was thereafter had of the attached property, which was purchased by the defendant, Jonas B. Aiken, and on the 11th day of May, 1877, the sale was confirmed and a deed made to the purchaser. On the 26th day of November, 1875, Charles A. Savage conveyed the lands in controversy to his brother, William T. Savage, by warranty deed, for an expressed consideration of \$10,000. On the 16th day of August, 1876, William T. Savage conveyed, by quit-claim deed, the land in controversy to Olivia T. Savage, the wife of Charles A. Savage, the consideration expressed in the deed being the sum of \$5,000. On the 27th day of June, 1877, the plaintiff commenced her action in the district court of Gage county, to remove the cloud from her title to the real estate in controversy, caused by the sheriff's deed to the defendant, Jonas B. Aiken, and to quiet and confirm her title to said real estate.

The defendant, Jonas B. Aiken, answered the plaintiff's petition, alleging, among other things, that Charles A. Savage "deeded said lands to his brother, William T. Savage, on the 26th day of November, A.D. 1875, without receiving any consideration therefor; and the said William T. Savage, fraudulently colluding with the said Charles A. Savage, for the purpose of hindering, delaying, and defrauding this defendant, deeded said lands to Olivia T. Savage, the plaintiff, and wife of the said Charles A. Savage, without receiving any consideration therefor," etc. These facts are denied in the reply.

It will be seen that the principal question in the case is, whether or not William T. Savage was a *bona fide*

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purchaser of the lands in controversy? He testifies that he came to Illinois in September, 1874. His brother Charles A., at that time being very sick, and supposing that he was about to die, wished to give Aiken one-half of these lands, provided Aiken would release his indebtedness to him (Aiken) and would pay about \$1,500 incumbrance on the land. The other half of the lands he gave to the witness and his sisters. He also testifies that he gave his note for these lands in the sum of \$10,000, in November, 1875; that when it was executed, an endorsement was put upon it of the amount that he claims to have previously sent to his brother Charles, and that after six months he paid thereon \$1,000, and that he assumed certain debts due from his brother to his sisters, amounting to several thousand dollars. He also testifies that in July, 1876, he offered Aiken a deed for one-half of these lands in liquidation of the indebtedness of his brother Charles, which Aiken declined. He also testifies that the plaintiff purchased these lands from him in August, 1876, giving \$10,000—that is, she gave him “two notes of five thousand dollars each—in payment at the time,” and the next year she paid \$1,000 in cash thereon. On cross-examination he states that at the time he purchased these lands he knew that “his brother was greatly troubled with his debts.” He also states that his brother had conveyed certain real estate to him in Quincy, Illinois, for a consideration expressed in the deed of \$1,500, for which he had paid nothing.

To constitute a *bona fide* purchase for a valuable consideration, it must be without notice and with the money actually paid. In cases of trust, there must not only be a denial of notice before the purchase, but a denial of notice before payment of the money. *Jewett v. Palmer*, 7 Johns. Ch., 68. *Harrison v. Southcote*, 1 Atk., 538. *Story v. Windsor*, 2 Id., 630.

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A person who purchases with notice, though for a valuable consideration, is not protected. It is very clear to our minds that William T. Savage is not a *bona fide* purchaser. He seems to have taken the conveyance for the express purpose of delaying and defrauding the creditors of his brother. His own testimony establishes this fact; but when considered in connection with the other testimony in the case, the proof on that point is conclusive. The plaintiff purchased while the case of Jonas B. Aiken against Charles A. Savage was pending, and after the attachment had been levied upon the land; and according to her own testimony she paid nothing thereon until nearly a year from the time of the alleged purchase—the deed from the sheriff to Aiken for the lands in controversy being filed for record on the 2d day of June, 1877—and is not a *bona fide* purchaser. No issue is made in the pleadings in regard to the indebtedness of Charles A. Savage to Aiken, and the large amount of testimony on that point in the record is not pertinent to the issue. The judgment of the court below, finding the issues in favor of the defendant, is clearly right, and is affirmed.

JUDGMENT AFFIRMED.

11	328
16	178
11	328
31	500
11	328
47	324
48	457

FIRST NATIONAL BANK OF BARNSVILLE, OHIO, PLAINTIFF
IN ERROR, V. AARON D. YOCUM, DEFENDANT IN ERROR.

- 1. Vendor and Vendee: FRAUD.** False statements made by the vendor of chattels, at the time of the sale, with the fraudulent intent to induce the purchaser to accept an inferior article as a superior one, or to give an exorbitant and unjust price therefor, will render such contract of purchase voidable; but such false statement must be of some matter affecting the character, quantity, quality, value, or title of such chattel.

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2. ———: **RESCISSIO**N. In order to rescind a contract for the purchase of chattels on account of fraudulent representations made by the vendor, the purchaser must, soon after making discovery of the faulty character of the chattels, offer to rescind the contract and put the subject-matter of the contract as near in *statu quo* as may be under the circumstances, or upon the trial must give a reason why the same could not reasonably be done.

ERROR from the district court for Adams county. Tried below before GASLIN, J. The action was on a promissory note given by Yocum to one Clark, in payment of a package of cloth, etc., and by Clark assigned to plaintiff. Defense: Fraudulent representations in quality of cloth, etc., that cloth was of no value whatever, etc., that Clark falsely represented to said defendant that Benjamin Bailey and others had purchased similar packages of cloth, etc., when in truth and fact, Bailey and others had not made any such purchase. Judgment below for defendant. The bill of exceptions having been quashed for the reason that it was not settled in time, the rulings of this court upon the errors complained of were limited to the record proper.

R. A. Batty, for plaintiff in error, cited 1 Parsons on Contracts (5th Edn.), 465-593. 2 Kent Com., 480. *Burton v. Schermerhorn*, 21 Vt., 289. *Ferguson v. Huston*, 6 Mo., 407. *Burton v. Stewart*, 3 Wend., 236.

Hewett & Yocum, for defendant in error. The instructions given by the court below are sound in law. 1 Wait's Actions and Defenses, 608. *Rumsey v. Leek*, 5 Wend., 20. *Small v. Smith*, 1 Denio, 583. *Sawyer v. Chambers*, 44 Barb., 42. *Van Valkenburger v. Stupplebeen*, 49 Barb., 99. *Skilding v. Warren*, 15 Johns., 280. 1 Wait's Actions and Defenses, 615. *Sell v. Rood*, 15 Johns., 230. *Shepherd v. Temple*, 3 N. H., 455. *Burton v. Stewart*, 3 Wend., 236.

COBB, J.

The first instruction given to the jury upon the trial of this case at the request of the defendant is in the following words: "If the jury find that Patrick Clark the payee named in the promissory note upon which this action was brought falsely represented to said defendant that one Benjamin Baily had purchased of the said Clark a similar package of goods to the package of goods sold and delivered by said Clark to the defendant, for which said promissory note was given, and that the said Benjamin Baily had paid for said package of goods so purchased by him the sum of one hundred and fifty dollars, and further find that the said Patrick Clark, said payee, made said statement to throw the defendant off his guard, and prevent the said defendant from examining said goods, and to induce said defendant to purchase said package of goods, and execute and deliver said promissory note for the same, and that the said defendant relied upon the said false representation so made by said Clark in making the purchase of said goods, and in the executing of and delivering of said promissory note, and that said false statements induced said defendant to purchase said package of goods, and execute and deliver said note, and the jury further find that said plaintiff had knowledge of said false representations so made by the said Patrick Clark before said plaintiff purchased said note, said plaintiff cannot recover on said promissory note, and they must find for the defendant."

Does this instruction state the law correctly as applicable to any possible state of testimony? If it does, then the verdict cannot be disturbed. For as the bill of exceptions was set aside and cannot be considered, the testimony will be presumed to sustain the verdict

First National Bank v. Yocum.

in every particular; but if the law as given to the jury in the instructions of the court cannot be sustained as correct in any event, then the verdict may be presumed to be the result of the misleading effect of such instruction. This instruction does not depend or lean upon any other of the instructions. But it announces a clear proposition, and tells the jury that if they shall find it to be true they shall find for the defendant. It is easy to conceive the propriety of an instruction to the effect that had the said Clark made false statements as to the quantity and quality of or title to the article purchased in a material respect, and the defendant had relied upon such statements as true and purchased the articles, and the statements had proven to be false, and by reason of their falsity the defendant had suffered loss, then, etc. But in the charge the element of loss is left out of view entirely. For all that appears in the logic of the instruction the trade was an entirely fortunate one to the defendant. Yet without regard to such consideration the jury are instructed to dispose of the case upon the issue of a question quite foreign to it.

There is no doubt that to sustain a defense for the cause set out or presumed in the instruction we are now considering, would require the same facts which it would require to sustain an action for damages for deceit in the sale of goods. See *King v. Eagle Mills*, 10 Allen, 548. Let us for a moment suppose that the defendant became dissatisfied with the goods immediately, and desired to sue Clark for deceit in selling them to him. I think if he kept within the limits of this instruction in drafting his petition he would find himself wanting at two important points. First, it could not be properly charged that the deceit practiced was of or concerning the goods, their quality, quantity, or title; nor, second, that the then plaintiff suffered damage by reason of such deceit.

Again, the instruction loses sight of the fact that in cases of the kind at bar the party upon whom deceit has been practiced has some duties to perform for his own protection, and generally in view of the rights of others. Where a person has been induced even by deceit and fraud to buy an article of merchandise at an unjust and exorbitant price, or an article of inferior quality and value, he must, soon after making discovery of the deceit and fraud and the exorbitancy of the price or the inferior quality and value of the articles, make at least some effort or offer to rescind the purchase and put even the deceitful vendor as near as may be in *statu quo*, at all events while the articles which are the subject of the controversy or a part of them are in existence.

These considerations are ignored by the instruction.

For the above reasons the judgment of the district court must be reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

11	332
16	141
18	116
18	275
18	696
18	701
22	480
11	332
33	398
11	332
37	262
11	332
41	196
11	332
53	741

THE A. & N. RAILROAD COMPANY, PLAINTIFF IN ERROR,
V. ANDERSON BAILLY, ADMINISTRATOR ETC., DEFEND-
ANT IN ERROR.

Practice: QUESTION FOR JURY. Though it is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court and not for the decision of the jury, this is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from them. And whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case is properly left to the jury. *Stout v. Railroad Co.*, 17 Wall., 657.

ERROR to the district court of Richardson county Tried below by WEAVER, J. The action there was brought by Anderson Bailey as administrator to recover damages, resulting from the death of his infant daughter, Alice N. Bailey, on account of the carelessness and negligence of the defendant company. Verdict and judgment for plaintiff in sum of \$2,000.00, from which the defendant prosecuted its petition in error.

- S. B. Galey, Isham Reavis, and E. W. Thomas (T. M. Marquett with them), for plaintiff in error, cited, *inter alia*, R. R. Co. v. Stout, 17 Wallace 657. *Detroit & W. R. R. Co. v. Van Steinburg*, 17 Mich., 99. 4 Wait's Act. & Def., p. 655. *Spencer v. Milwaukee*, 17 Wis., 487. *Greenleaf v. Ills. C. R. R. Co.*, 29 Iowa 14; also 4 Am. R. 181. *Wolfkiel v. Sixth Av. R. R. Co.*, 38 N. Y., 49. Field on Damages, p. 178.

Frank Martin and *C. Gillespie* for defendant in error.

The court was careful in stating specifically and in detail the ingredients of legal negligence, for negligence is the product of certain proved pre-existing facts. All facts being duly found necessary to constitute the negligence, then the negligence itself is the aggregate of these facts, and the liability attaches. There was nothing in the instruction calculated to mislead the jury or prejudice the rights of the railroad company. The court could have gone much further with safety. *Railroad Co. v. Breale*, 73 Penn. State, 504. *Shearman & Redfield on Negligence*, 11. *Wharton on Negligence*, 420, and cases cited.

COBB, J.

The first instruction given the jury on the trial of this cause is in the following words:

"You are instructed that if you find from the evidence that the said defendant owned and used the said turn-table in an open and exposed public place, without any enclosure or fastening or precaution whatever to prevent thoughtless children from going upon and playing with the same, and that said turn-table was a ponderous and dangerous machine calculated to induce thoughtless and meddlesome children to go upon and play with the same, and that the defendant had notice of these facts and neglected to take the necessary and proper steps to enclose, fasten, or guard the same so as to prevent children from going upon and playing with said turn-table; and if you further find from the evidence that the deceased, Alice N. Bailey, was a child of such tender years as to be incapable of exercising any discretion in the premises, and had no knowledge of the dangerous character of the said machine, and was there without any fault or negligence on her part, or on the part of the plaintiff and parents, and while so there without any fault of hers or her parents, or this plaintiff, she was so injured by said machine that she died, then the jury will find for the plaintiff, and assess his damages at such sum as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, not to exceed five thousand dollars."

In this instruction, the jury are in effect told by the court, that if they believed from the evidence that "the said defendant owned and used the said turn-table in an open and exposed public place, without any enclosure or fastening or precaution whatever to prevent thoughtless children from going upon and playing with the same, and that said turn-table was a ponderous and dangerous machine calculated to induce thoughtless and meddlesome children to go upon and play with the same, and that the defendant had notice

A. & N. R. R. Co. v. Bailey.

of these facts and neglected to take the necessary steps to enclose, fasten, or guard the same so as to prevent children from going upon and playing with said turn-table," etc., they should find that the defendant was guilty of negligence.

In this instruction I think the court erred. There is in the testimony, to say the least of it, considerable conflict as to the situation of the turn-table with reference to its contiguity to the settled part of Falls City, as well at the time of its construction as at the time of the accident, and also in respect to other matters. I think it should have been left to the jury to find from the testimony whether, under all the circumstances, the defendant was guilty of negligence in erecting the turn-table at the place and allowing it to remain in the condition as shown by the testimony.

The supreme court of Connecticut, in the well-considered case of *Park v. O'Brien*, 23 Conn., 388, says: "The question as to the existence of negligence or want of ordinary care is one of a complex character. The inquiry, not only as to its existence but whether it contributed, with negligence on the part of another, to produce a particular effect, is much more complicated. As to both, they present, from their very nature, a question not of law but of fact, depending on the peculiar circumstances of each case, which circumstances are only evidential of the principal fact—that of negligence or its effects—and are to be compared and weighed by the jury, the tribunal whose province it is to find facts, not by any artificial rules, but by the ordinary principles of reasoning; and such principal facts must be found by them before the court can take cognizance of it and pronounce upon its legal effect."

In the case of the *Detroit & Milwaukee R. R. Co. v. Van Steinburg*, 17 Mich., 99, the supreme court of Michigan, by Ch. J. Cooley, after citing the above case

with approval, add: "It is a mistake therefore to say, as is sometimes said, that where the facts are undisputed, the question of negligence is necessarily one of law. This is generally true only of that class of cases where a party has failed in the performance of a clear legal duty. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ."

The case of *Railroad Co. v. Stout*, 17 Wall., 657, was a case very similar to the case at bar. At the trial in the court below the jury were instructed as follows: "To maintain the action, it must appear by the evidence that the turn-table, in the condition, situation, and place where it then was, was a dangerous machine—one which, if unguarded or unlocked, would be likely to cause injury to children; that if, in its construction and the manner in which it was left, it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was as the defendant's property, in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it or that they would be likely to be injured if they did resort to it, then there was no negligence." This instruction was distinctly approved by the supreme court of the United States. In the opinion they say: "Upon the facts

proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used and that there was no negligence. It is this class of cases and those akin to it, that the law commits to the decision of a jury. * * It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than a single judge.

“In no class of cases can this practical experience be more wisely applied than in that we are considering. We find accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us that although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given, or whether they established negligence.”

The law as settled by the above cases commends itself to the approval of this court, and does not sustain the instruction above set out.

There are several other points made in the petition in error and brief of counsel, but having reached the conclusion above indicated, it is deemed unnecessary to notice them.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

11	338
17	625
11	338
31	894
11	338
40	739
40	751
41	612

BOWERS H. LEONARD, APPELLANT, v. THE WHITE CLOUD
FERRY COMPANY, APPELLEE.

Judgment: MORTGAGE: PRIORITY OF LIENS. One M., after the recovery of a judgment against him in the district court, received a conveyance of real estate in the county where the judgment was rendered, which land he afterwards conveyed. Afterwards an execution was issued on the judgment and levied on the land in question. In an action by a subsequent mortgagee to enjoin the sale, upon the ground that M. was never in fact the owner of the land, but a mere agent, *held*, that the testimony failed to show that M. did not take the title as owner.

APPEAL from the district court of Lancaster county.
Tried below before POUND, J.

Lamb, Billingsley & Lambertson, for appellant, cited *Uhl v. May*, 5 Neb., 157. *Metz v. State Bank*, 7 Id., 165. *Dorsey v. Hall*, Id., 460. The rule laid down in *Foley v. Duncan*, 1 Neb., 134, should certainly be maintained in this case where a non-resident party took his title while it was in force, if it may be deemed to be in any manner shaken since. *Stiles v. Murphy*, 4 Ohio, 92. *Packer's Appeal*, 6 Penn. St., 277. *Lea v. Hopkins*, 7 Id., 492. *Calhoun v. Snider*, 6 Binn., 135.

James E. Philpott, for appellee, cited *Colt v. Dubois*, 7 Neb., 391. *Berkley v. Lamb*, 8 Id., 392.

MAXWELL, CH. J.

The allegations of the petition are in substance that on the eleventh day of January, 1875, the defendant recovered a judgment in the district court of Lancaster county against J. H. McMurtry, for the sum of \$715 and costs; that on the first day of August, 1876, one George Keifer owned the east one-half of section 6, township 9, range 5, in Lancaster county, and on or

Leonard v. White Cloud Ferry Co.

about that date, McMurtry, as the mere agent of John S. and E. Mary Gregory, traded to one Downing the north-west one-fourth of section 27, township 10, range 6, in exchange for a house and lot in Irvington, Indiana, and that said house and lot were traded for the land in question for said Gregorys; that the grantee's name was omitted from said deed at the time of its execution and delivery, but afterwards, in the absence of McMurtry and without his knowledge or consent, his name was inserted in the deed as grantee; that thereupon McMurtry traded the east one-half of section 6, township 9, range 5, to one Chappell, for another house and lot in Irvington, Indiana, of no value above the incumbrances, and a mortgage by said Chappell on the lands in question for \$1,700, which was more than the value of the same, and that McMurtry turned over said mortgage and accompanying notes to the Gregorys, who immediately negotiated the same to the plaintiff; that all of the above trades and exchanges were mutually dependent one upon the other, and that the former of said exchanges would not have been made unless the latter had been effected; that said land was not then, nor is it yet, of greater value than \$1,200 or \$1,500; that Chappell is a non-resident of the state, and insolvent, and has paid no part of said debt nor the taxes on said land, and on the fifteenth day of November, 1877, the plaintiff took said land from Chappell in satisfaction of said debt, and received a deed of conveyance of the same; that McMurtry never was the owner or had any interest in said land, nor was it ever subject to the lien of said judgment, yet the defendant, under an execution issued out of said court upon said judgment, has levied upon said land and advertised said property for sale. It is also alleged that McMurtry was discharged by proceedings in bankruptcy from the payment of said debt. The prayer is for a decree

enjoining the sale, etc. An answer and reply thereto were filed, which it is unnecessary to notice. On the trial of the cause the court found the issues in favor of the defendant, and dismissed the action. The plaintiff appeals to this court.

The record presents but one question of fact for our determination, viz., was McMurtry in fact the owner of the land conveyed to the plaintiff, or was he a mere trustee or agent, as the lien of the judgment would attach to no greater interest in the land than he possessed? *Uhl v. May*, 5 Neb., 157. *Metz v. State Bank*, 7 Id., 155. *Galway v. Malchow* Id., 285. *Dorsey v. Hall*, Id., 460. *Mansfield v. Gregory*, 8 Id., 432. But three witnesses testified in the case—McMurtry, John S. Gregory, jr., and the plaintiff. The testimony of the plaintiff is confined principally to the value of the land. The testimony of McMurtry and Gregory clearly establishes the fact that the chattel mortgage was sold by McMurtry to one of the Lincoln banks, and the proceeds were applied to *his own use*. If he was not the owner of the land in controversy, the proof fails to establish that fact. This court held in the case of *Colt v. Dubois*, 7 Neb., 391, and *Berkley v. Lamb*, 8 Id., 392, that the lien of a judgment attached to after acquired lands. If this rule is unsatisfactory it should be changed by the legislature and not by the courts, and we must adhere to our former decision upon that question. Neither does the testimony show any ground upon which a court would be justified in declaring the lien of the plaintiff superior to that of the judgment. As there is no error in the judgment it must be affirmed.

JUDGMENT AFFIRMED.

EUGENE W. WRIGHT AND OTHERS, PLAINTIFFS IN ERROR,
v. MONROE E. SMITH AND ADELBERT CRITTENDEN,
DEFENDANTS IN ERROR.

11	841
23	101
11	841
61	655

Attachment: LIEN. S. and C. commenced an action in the district court against W. and caused an attachment to be issued and levied upon his real estate. Afterwards W. conveyed the land to C., who mortgaged the same to the wife of W. to secure the sum of \$520.00. After the recovery of judgment and an order of sale of the attached property, the plaintiffs in that suit filed a petition to remove the cloud upon the land attached caused by the above conveyance and mortgage. *Held*, that the lien of the attachment took effect from the date of the levy, and the instruments, being made *pendente lite*, were not a cloud upon the creditor's title.

ERROR to the district court of Butler county. Tried below before Post, J.

H. R. Dean, for plaintiffs in error.

Clinton, Hart & Brewer, for defendants in error, cited *Loving v. Pairo*, 10 Iowa, 288. *Bick v. Burdett*, 1 Paige, 305.

MAXWELL, CH. J.

This is an action in the nature of a creditor's bill. The petition alleges in substance that on the 1st day of February, 1877, Smith and Crittenden, the defendants in error, commenced an action against the plaintiff in the district court of Butler county to recover the sum of \$1733.31 and costs; that on the 3d day of that month an order of attachment was duly issued in said cause and levied upon the south half of the south-east quarter of sec. 27, township 16, range 1, as the property of said Wright; that on the 3d day of December, 1878, the plaintiffs in said action recovered a judgment against

said Wright for the sum above specified and costs, and obtained an order of sale of the attached property, and that on the 4th day of said month, a special execution was issued for the sale of said real estate, and the same has been duly levied thereon. The petition then sets forth various conveyances of the premises in question, which it is unnecessary to notice, as it is alleged that afterwards, and on August 30th, 1877, said Sally S. Wright conveyed said premises to this defendant (Wright), and on September 18th, 1878, following, said Eugene W. Wright conveyed the same to one Martin Cady for the expressed consideration of \$750.00, and said deed is of record in book 2, page 366, of the deed record of said Butler county, etc. It is also alleged that on the date of said conveyance, Cady and wife executed a mortgage for the sum of \$520.00 upon said real estate to the wife of Eugene W. Wright, and that the same is recorded in the mortgage records of said county, and that said conveyances were fraudulent and void as to the creditors, and were not made in good faith, but for the purpose of cheating and defrauding the plaintiffs (Smith and Crittenden). That said "conveyance and mortgage are clouds upon the title of the execution defendant, and will remain so upon that of the purchasers at said execution sale, and will tend largely to prevent a fair sale." "Wherefore the plaintiffs pray that the same may be decreed null and void and of no effect against plaintiffs as well as those of the purchaser at sheriff's sale," etc.

An answer and reply were filed, to which it is unnecessary to refer. On the trial of the cause, judgment was rendered in favor of the plaintiffs, and subjecting the land to the payment of the debt. The defendant brings the cause into this court by petition in error.

There is no bill of exceptions in the case, and the

sole question for our determination is, does the petition state a cause of action? In other words, admitting that the deed and mortgage above described are fraudulent and void as to creditors, are they a cloud upon the title of the plaintiffs in the execution?

Section 19 of the code provides that "an action shall be deemed commenced within the meaning of this title, as to the defendant, at the date of the summons which is served upon him," etc.

Section 86 provides that "when summons is served or publication made, the action is pending so as to charge third persons with notice of its pendency, and while so pending, no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title."

Section 500 provides that "the (sheriff's) deed shall be sufficient evidence of the regularity of such sale, and the proceedings therein until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned as was vested in the party at or after the time when such lands and tenements became liable to the satisfaction of the judgment," etc.

Now when did the lands in question become liable to the satisfaction of the judgment? Drake, in his work on Attachments, section 221, says: "When questions arise as to the title of property claimed through an attachment, and the judgment and execution following it, the rights so acquired look back for their inception, not to the judgment but to the attachment." *Tyrell v. Rountree*, 7 Peters, 464. *Stephen v. Thayer*, 2 Bay, 272. *Bank v. Morris Land and Banking Co.*, 6 Hill, 362. *Martin v. Dryden*, 1 Gilman, 187. *Redus v. Wofford*, 4 S. & M., 579. *Brown v. Williams*, 1 Me., 403. *Tappan v. Harrison*, 2 Humph, 172. *Oldham v. Scuvener*, 3 B. Mon., 579. *Luckey v. Siebert*, 23

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Mo., 85. *Hannahs v. Felt*, 15 Iowa, 141. *Cockey v. Milne*, 16 Md., 200.

The deed and mortgage in question having been made while the action was pending, and after the levy of the attachment therein upon the land in controversy, do not in any manner create a cloud upon or affect the title of the plaintiffs in execution to the lands levied upon under the attachment.

The petition therefore fails to state a cause of action, and as it appears that it cannot be amended, the judgment of the district court is reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

11	344
12	98
11	344
55	128
11	344
38	741
139	883
11	344
44	429
11	344
55	153
11	344
61	539

THE SOUTH PLATTE LAND CO., APPELLEES, V. THE
CITY OF CRETE AND JOSEPH RUFFNER, TREASURER,
APPELLANTS.

1. **Injunction to Restrain Collection of Tax.** An injunction to restrain the collection of a tax will not be granted unless the tax complained of is either void or its enforcement decidedly inequitable.
2. **Taxation: ASSESSMENT ESSENTIAL.** An assessment of property is essential to the validity of a tax. If there be no assessment the tax is void, and relief against it by injunction proper.
3. ———. But a formal assessment, although not made in the mode contemplated by the law, if not inequitable, will support a levy otherwise legal.
4. ———. The fact that the board of equalization failed to meet, whereby no opportunity was afforded the plaintiff to appear and show that the "assessment was too high," is no ground for equitable relief without showing that the valuation was, relatively, too high, and that the complainant desired to have it equalized by a suitable reduction.
5. ———: **OATH TO ASSESSMENT ROLL.** A tax in all other respects proper, levied upon an unverified but fair valuation, is just as equitable as if the required verification had been made.

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APPEAL by defendants from a decree rendered against them in the district court of Saline county, **WEAVER, J.**, presiding, perpetually enjoining the collection of taxes assessed and levied upon the property of plaintiff for the year 1874.

M. B. C. True, and Lamb, Billingsley & Lambertson, for appellants, cited *Cooley on Taxation*, 195. *Saxton v. Nims*, 14 Mass., 315. *Crommet v. Pearson*, 18 Maine, 344. *Palmer v. Boling*, 8 Cal., 384. *Hartwell v. Root*, 19 Johns., 345. *Guy v. Washburn*, 28 Cal., 111. *Lessees of Ward v. Barrows*, 2 Ohio State, 242.

T. M. Marquett, for appellee, cited *Buller v. Supervisors*, 26 Mich., 22. *Darling v. Gunn*, 50 Ill., 428. *Cooley on Taxation*, 266. *South Platte Land Co. v. Buffalo Co.*, 7 Neb., 253.

LAKE, J.

The first question raised by the appellant goes to the sufficiency of the facts stated in the petition to constitute a cause of action.

Where the suit is at law for the purpose of depriving one of his property through the medium of the taxing power, the courts look upon the proceedings under revenue laws far differently than where it is in equity asking an injunction to restrain the collection of a tax. In the former case all the essential requirements of the law must have been met, or the action will fail, and the ownership of the property remain unaffected, while in the latter, unless the tax be absolutely void, or its enforcement decidedly inequitable, the relief sought will be denied.

In *Dundy v. Richardson County*, 8 Neb., 508, we held that "when a party seeks to enjoin the collection of a

South Platte Land Co. v. City of Crete.

tax upon real estate, he must set forth such facts in his petition as will show the collection of the tax to be unjust and inequitable." In other words, he must bring his case within some acknowledged head of equity jurisdiction. *South Platte Land Co. v. Buffalo County*, 7 Neb., 253. With this understanding of the law the question presented is not difficult to answer.

The defendant, the city of Crete, is a municipal corporation organized under the general law for the incorporation of cities of the second class, and as such is invested with the power, under certain restrictions, to levy and collect taxes as a means of accomplishing the purposes of its creation. This much the plaintiff concedes, but contends in argument that by the several allegations in his petition he shows the particular taxes in question to be void and inequitable. On this point the first ground of infirmity relied on is that there was no assessment of the property for taxation. If the petition really showed this to be so, inasmuch as assessment is the basis of a valid tax, it would, under the rule adopted by this court, be good ground for the relief sought. But does it? On this subject the allegation is: "That no assessment whatever was made of the plaintiff's said property, for the year 1874, as required by law." The legitimate inference from this is, not that no assessment was made, but that one was made, not, however, "*as required by law*." In other words, that it was illegally made, which, by subsequent averments, is shown to have been the fact. Instead of valuing the property according to his own judgment of its worth, the averment is that the city assessor adopted an assessment made by the precinct assessor, under the state law for general revenue purposes, returning to the city council a copy thereof as his own valuation.

While the mode here adopted was not the one cou-

templated for fixing the value of property for the proposed levy, it was by no means void. In form, at least, it was correct, and, for aught that is shown, was entirely just and equitable to the plaintiff. Indeed the effort at complaint on this score realized only this which we quote: "That the said pretended assessment put on the said property of the plaintiff an excessive value, and that this value so put on said real estate and property of plaintiff would cause plaintiff to pay more than its just proportion of taxes." All this, however, may be true, and still no ground exist for the equitable relief prayed. Besides, the allegation of excessive valuation, on which the second proposition rests, is but a mere conclusion, with no facts stated to warrant it. There is nothing averred from which the court would be justified in saying that the valuation was above the real worth of the property, or disproportionate to that given to the property of all the other tax-payers of the city.

We conclude, therefore, that the taxes in question were not, as claimed, void; and although perhaps so affected by infirmities as to render them illegal and incapable of enforcement as against the plaintiff's property, there is no visible consideration leading us to say that they are inequitable, and should be enjoined. *Wood v. Helmer*, 10 Neb., 65. *Hunt v. Easterday*, Id., 165. *Boeck v. Merriam*, Id., 199. *Southard v. Dorrington*, Id., 119.

Another ground of complaint made against these taxes is, that "the said city council never sat as a board of equalization," and that in consequence of not doing so, the "plaintiff had no opportunity to appear and show that said pretended assessment was too high." But the mere "opportunity" to appear and make such showing would have been of no benefit unless the valuation was relatively too high, and the plaintiff desired

Colby v. Place.

to have it equalized by a suitable reduction, neither of which facts is shown.

And what we have thus far said in effect virtually disposes of the only other point made which it is necessary to notice, viz., that "no oath was attached" to the assessment roll by the assessor. Whatever effect the want of such oath might have in an action at law, it certainly can have none in a case like this. A tax, in all other respects proper, levied upon a valuation unverified but fair, is just as equitable, and the owner of the property in conscience just as much bound to pay it as if the required verification had been duly made.

With these views, we reach the conclusion that the petition fails to state a cause of action for equitable relief. The judgment of the district court must be reversed, and the case dismissed at the costs of the plaintiff.

JUDGMENT ACCORDINGLY.

LEONARD W. COLBY, PLAINTIFF IN ERROR, v. GEORGE W. PLACE AND NATHANIEL HERRON, SHERIFF OF GAGE COUNTY, DEFENDANTS IN ERROR.

1. **Mortgage:** PURCHASE AFTER DECREE: EXTENSION OF TIME OF PAYMENT. L. W. C. purchased certain real estate subject to a decree of foreclosure. After the purchase the mortgagor and mortgagee entered into a contract that upon the payment by the mortgagor of a portion of the amount due on the decree, the time of payment of the remainder was to be extended for more than one year, the rate of interest being increased from 10 to 12 per cent. In an action by the purchaser to have the land declared free from the mortgage on account of the extension of time, *Held*, that the mortgaged property was the primary fund for the payment of the decree, and not a mere surety.
2. ———: INTEREST. The mortgaged estate was not liable for a greater rate of interest than ten per cent.

ERROR to the district court for Gage county. Tried below before WEAVER, J.

Colby & Hazlett and Charles O. Bates, for plaintiff in error.

Property pledged as security or occupying the position of surety is discharged under similar circumstances to those which discharge an individual surety, and anything which will discharge an individual surety will discharge such property. Brandt on Suretyship and Guaranty, 21, 23. *Gahn v. Niemcewicz*, 11 Wend., 324. *Niemcewicz v. Gahn*, 3 Paige Ch., 614. 1 Hiliard on Mortgages, 494. *Fry v. Shehee*, 55 Georgia, 208. 4 Wait's Actions and Defenses, 584. *Coyle v. Davis*, 20 Wis., 568. The effect of the agreement for extension of the time of payment of the mortgage debt, and for a new rate of interest, was to work a novation of said debt, and all persons and securities liable under the original contract and not parties to the new agreement were discharged thereby. 2 Parsons on Contracts, 18. *Union Life Insurance Co. v. Bell*, 35 Ohio State, 365. *Bishop v. Busse*, 69 Ill., 403. *Mather v. Butler County*, 28 Iowa, 253. *Ayres v. Watson*, 37 Penn. State, 360.

Pemberton & Forbes and A. H. Babcock, for defendants in error, cited Bouv. Law Dict., Title "Novation." 2 Jones on Mortgages, secs. 924, 983. *Cross v. District Township*, 14 Iowa, 28. 1 Jones on Mortgages, secs. 736, 737. *Maher v. Lanfrom*, 86 Ill., 513. *Fuller v. Hunt*, 48 Iowa, 163. *Thompson v. Thompson*, 4 Ohio St., 333, 349. Wade on Notice, sec. 11. *Whittacre v. Fuller*, 5 Minn., 508.

MAXWELL, CH. J.

This is an action to enjoin a decree of foreclosure. The petition states in substance that on the twenty-

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sixth day of October, 1874, Alured N. Wiswell and wife, being the owners of lots one and two in block number seven, in the city of Beatrice, executed a mortgage on said lots to George W. Place, to secure the sum of \$1,000 with interest. That thereafter at the May term, 1878, of the district court of Gage county, a decree of foreclosure was rendered on said mortgage for the sum of \$1,151.19 and costs. That thereafter the said Alured N. Wiswell and wife conveyed said premises by warranty deed to one Royal Wiswell, and that thereafter, on the sixteenth day of November, 1878, said Royal Wiswell, in consideration of the sum of \$3,000, conveyed said premises by a warranty deed to the plaintiff. A copy of the deed is attached to and made a part of the petition. The covenants in the deed are as follows: "And we hereby covenant with the said L. W. Colby that we hold said premises by good and perfect title; that we have good right and lawful authority to sell and convey the same; that they are free and clear from all liens and incumbrances whatsoever, excepting the mortgage below mentioned, and we covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever, excepting a mortgage for \$1,000 given by A. N. Wiswell to G. W. Place, which has been foreclosed, and in which a decree has been rendered in the district court of said county."

The petition also alleges that on the twenty-eighth day of November, 1878, George W. Place, being the owner of the decree of foreclosure, entered into an agreement with Alured N. Wiswell and wife, whereby a stay of the order of sale was had for the period of one year from the first day of February, 1879, upon condition that said Wiswell should pay \$500 on said decree prior to January 1st, 1879, and that the remainder of the decree should draw interest at the rate of 12 per

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cent per annum, instead of 10 per cent as stated in the decree, and also that said Wiswell should keep said premises insured in favor of Place against loss by fire; that said agreement was entered into without the consent of plaintiff, and that at that time said Wiswell was solvent and able to pay all his debts, but since that time he has become wholly insolvent, etc. That on the tenth day of May, 1880, the defendant Place caused an order of sale to be issued on said decree, and delivered to the sheriff of said county, requiring him to sell said premises to satisfy the amount remaining due on said decree, etc. The plaintiff therefore prays for a decree declaring said premises discharged from the lien of said mortgage and enjoining a sale of the same." A demurrer to the petition was sustained in the court below and the action dismissed. The plaintiff brings the cause to this court upon a petition in error.

The agreement extending the time of payment is attached to the petition as an exhibit, and made a part of it, and is as follows;

"It is hereby stipulated and agreed by and between the parties plaintiff and defendant in this action as follows, to-wit: It is agreed that a stay of execution and order of sale upon the decree heretofore rendered in this cause be had for the period of one year from the first day of January, 1879, and that the time shall be extended for the payment of said decree from (to) the first day of January, 1880. The balance of said decree remaining unpaid to draw interest at the rate of 12 per cent per annum from February 1, 1879, until paid; provided, however, and the above stay of the decree is only upon the condition that the said defendants shall pay, or cause to be paid, on said judgment and decree the sum of five hundred dollars on or before the first day of January, 1879, and the said defendants shall further have and keep the house situated on the

premises described in said decree insured against damage or loss by fire, said policy of insurance providing that in case of loss or damage said insurance money shall be payable to the plaintiff to an amount not exceeding said decree. The amount of said policy to be not less than \$1,500. If the said defendant does not fully comply with the terms of this agreement then the agreement of the said plaintiff for stay of order of sale herein shall be void and of no force, virtue, or effect.

“Dated this 28th day of November, A.D. 1878.

“GEO. W. PLACE, plaintiff,

“By HARDY & SOMERS, his attorneys.

“ALURED N. WISWELL AND

“MARY J. WISWELL, defendants,

“By COLBY & HAZLETT, their attorneys.”

The exhibits attached to the petition and made a part of it, show that the \$500 was paid and the insurance effected as provided in the agreement.

The plaintiff contends that by reason of the extension of the time of payment of decree, the lien of the mortgage upon the premises in question is divested, and he is entitled to hold the same free from such incumbrance. In other words, that the mortgage is a mere security for the payment of the debt of the mortgagors, and that the property is liable only as surety for them. Without determining the validity of the agreement in question, signed as it is merely by the attorneys of the parties, of which the plaintiff was one, or of the exceptions of the mortgage debt in the covenants in the deed, no questions being raised thereon, we will proceed at once to the inquiry whether or not the land is held merely as surety for the payment of the decree. Where an ordinary judgment is recovered the law requires “that of the goods and chattels of the debtor he (the sheriff) cause to be made the

money specified in the writ, and for want of goods and chattels he cause the same to be made of the lands and tenements of the debtor," etc. Code, sec. 483. But this rule does not apply to a decree of foreclosure.

Section 848 of the code provides that "after such petition (to foreclose) shall be filed, while the same is pending, and after the decree thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court." After a decree of foreclosure is rendered the mortgaged estate becomes the primary fund for the payment of the mortgage debt. And upon the principle that the land mortgaged is the primary fund for the satisfaction of the mortgage, it has been held that if the mortgagee at the request of the heirs delay proceedings in foreclosure until the land depreciated in value, and the administrator had applied the whole of the personal estate to the payment of other debts, the loss must be sustained by the creditor unless he can be indemnified out of other lands belonging to the heir. *Johnson v. Corbett*, 11 Paige, 272. In this state the mortgagee cannot be compelled to file his claim against the estate of the mortgagor and share in the general distribution of the assets, but may at once on his mortgage becoming due, institute an action of foreclosure thereon. *Null v. Jones*, 5 Neb., 500. *Jones v. Null*, 9 Id., 57. It is very clear that the real estate in controversy is the primary fund for the payment of the decree, and not merely surety for the payment of the same. This is decisive of the case. If relief was sought against the excess of interest over ten per cent, the plaintiff in a proper case would be entitled to relief, as the agreement between the mortgagor and mortgagee cannot have the effect of extending the lien of the decree so as to affect a purchaser of the equity of redemption. But such

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relief is not sought in this case, and as the petition fails to state a cause of action, the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. C. J. DILWORTH,
ATTORNEY GENERAL, PLAINTIFF, V. THE COUNCIL
BLUFFS AND NEBRASKA FERRY COMPANY ET AL.,
DEFENDANTS.

Corporation: FORFEITURE OF FRANCHISE. Repeated and wilful acts of misuser or nonuser by a corporation which are of the essence of the contract between it and the state, constitute a just ground of forfeiture of the franchise.

ORIGINAL information in the nature of *quo warranto*.

George W. Doane, for plaintiff.

George E. Pritchett, for defendant.

BY THE COURT.

This is an information filed on behalf of the state to have the corporate rights, privileges, and franchises of the defendant declared forfeited for non-user. It is alleged in the information that on the 16th day of January, 1855, an act was passed by the territorial legislature "to incorporate the Council Bluffs and Nebraska Ferry Company," which act was approved February 21, 1855. That "by the third section of said act the corporate business of said corporation should be managed by a board of directors of not less than five nor more than seven, who should be stockholders, and from their number they should choose a president

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and treasurer who should hold their office for one year and until their successors should be chosen. That by the fourth section of said act exclusive power was conferred upon said corporation to keep a ferry and build a toll bridge across the Missouri river at a point known as the Lone Tree Ferry, opposite the city of Omaha, the then place of crossing, or at any other practicable point on said river midway between the grade at or near the said Lone Tree Ferry landing in Iowa, and the ferry landing of Florence, and midway between said grade and the ferry landing at Bellevue. That by the fifth section of said act it was made the duty of said company to procure and keep a suitable boat or boats, or erect and keep in repair a substantial bridge for the safe and speedy transportation of persons and property over said river at all reasonable and suitable times. That said act was duly published among the laws of the first session of said legislative assembly on page 448, to which reference is made. That in pursuance of said act, the said company, soon after the passage thereof, organized by the election of officers, and for a time performed the duty required of it by said fifth section by procuring and keeping a suitable boat for the transportation of persons and property over said river. That since the first day of March, 1877, the said company has utterly and wilfully failed and neglected to perform its duty in that behalf, and has not during all that time kept a suitable or any boat, nor erected nor kept in repair a substantial, nor any bridge for the transportation of persons and property over said river at all reasonable and suitable times, or for any other purpose, whereby the rights, privileges, and franchises of said company have become and are subject to be forfeited. That during all said time, until within a few months past, the said officers, provided by section three of said act, were not elected by the stock-

holders of said company, and no president and treasurer, or either of them, was chosen by the board of directors as required by said section three, but relator is informed that the said William W. Marsh now claims to have been duly chosen as president, and the said Frank Murphy as treasurer of said corporation, and they have for the space of five days and more last past assumed to act as such officers, notwithstanding the forfeiture of the rights and franchises of the said corporation as aforesaid."

The defendant moved to quash the information upon the ground that it was not filed by the proper officers. The motion was overruled and leave given to answer. No answer being filed, the state asks for a judgment by default.

As the defendant has failed to answer, the facts stated in the information are thereby admitted to be true. It is a tacit condition of a grant of incorporation, that the grantees shall act up to the end or design for which they were incorporated. Therefore if it neglect or abuse its franchises it may forfeit them as for condition broken. It may be stated as a general principle that when there has been a misuser or non-user in regard to matters which are of the essence of the contract between the corporation and the state, and the acts or omissions complained of have been repeated and wilful, they constitute a just ground of forfeiture. *Commonwealth v. Com. Bank*, 28 Penn. St., 389. *State v. New Orleans Gas L. Co.*, 2 Rob. La., 529, *Day v. Stetson*, 8 Greene, 372. *John v. Farmers' Bank*, 2 Blackf., 367. *All Saints Church v. Lovett*, 1 Hall., 198. *Hodsdon v. Copeland*, 16 Me., 314. *Penobscot Boom Co. v. Lamson*, 16 Id., 224. *Dartmouth College v. Woodward*, 4 Wheat., 658. 1 Black. Com., 485. 2 Kent Com., 312. *Rex v. Saunders*, 3 East., 119. *Rex v. Pasmore*, 3 Term., 246. *Eastern Archipelago Co. v.*

Richardson County v. Meyer.

Reginam, 2 E. & B., 857. As the defendant has wilfully neglected to use its franchise for a long period of time, and no excuse is offered for such neglect, it has therefore forfeited all its corporate rights and privileges. A judgment will be entered declaring such corporate rights and franchises forfeited.

JUDGMENT ACCORDINGLY.

RICHARDSON COUNTY, PLAINTIFF IN ERROR, v. PHILIP MEYER, DEFENDANT IN ERROR.

County: LIABILITY FOR MONEY PAID TREASURER. A county treasurer is to hold money received for the redemption of lands sold at tax sale subject to the order of the purchaser, his agent or attorney, and the county is not liable for such funds unless they have been paid into the county treasury.

ERROR to the district court for Richardson county.
Tried below before WEAVER, J.

W. S. Stretch, for plaintiff in error.

C. Gillespie and *George P. Uhl*, for defendant in error.

MAXWELL, CH. J.

This is an action to recover the excess over 12 per cent paid by the defendant in error to the treasurer of Richardson county, for the redemption of certain real estate from a pretended sale for taxes. The petition alleges that from the year 1870 to 1877, the plaintiff (defendant in error) was the owner of the south-east quarter and the east three-quarters of the south-west quarter of sec. 25, town 2, range 16 east, in Richard-

son county, and that the taxes levied against the same for the year 1871 amounted to the sum of \$62.00; for the year 1872 the sum of \$48.07; for the year 1873 the sum of \$44.77; that on the 7th day of September, 1874, the treasurer of said county pretended to sell said land to one S. B. Miles for the above named taxes; that Miles denied purchasing said land, and refused to pay said taxes, whereupon the commissioners of said county in the year 1875 commenced an action against him to recover the same together with a large amount of other taxes; that said action was litigated until Feb. 22, 1881, when said commissioners dismissed the same; that while said action was pending, to-wit: on the 9th day of May, 1877, the plaintiff desiring to pay all taxes due on said land was compelled to pay the sum of \$160.84 more than 12 per cent interest to redeem the same, to-wit the sum of \$393.12, the amount lawfully due thereon, being the sum of \$232.28; that said excess was paid under protest; that said treasurer in computing the amount to redeem said land, reckoned the interest at forty per cent per annum for two years from the date of said pretended sale, and at twelve per cent thereafter, and also added the penalty and other fees allowed by law; that on the 22d day of February, 1881, the plaintiff presented his account above set forth to the county commissioners of said county, who rejected the same. The county commissioners demurred to the petition upon the ground that the facts stated therein were not sufficient to entitle the plaintiff to recover against the county. The demurrer was overruled and judgment entered against the county for the sum of \$159.30. The case is brought into this court by petition in error.

Sec. 66 of the revenue law (Gen. Stat. 922) provides "that the treasurer shall enter a memorandum of the redemption in the list of sales, and give a receipt

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therefor to the person redeeming the same, for which he may charge a fee of fifty cents, and shall hold the redemption money paid, subject to the order of the purchaser, his agent, or attorney," etc. The county is not primarily liable for money paid to the treasurer for the redemption of lands sold at tax sale. Such moneys are to be paid to the purchaser, his agent, or attorney, and no warrant of the county commissioners is necessary for its repayment where it is not paid into the county treasury. *Eaton v. Cass County, ante.* p. 229. When, however, a treasurer on retiring from office, in his settlement with the county commissioners accounts for such funds and they are paid into the county treasury, justice requires that they should be paid to the party entitled to the same. But the petition in this case fails to allege that the amount claimed, or any part of it, has ever been paid into the county treasury. This is a material allegation where it is sought to make the county liable. The petition therefore fails to state a cause of action against the county. The judgment of the district court is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

THE STATE, EX REL. B. F. PERCIVAL, v. R. L. STUDHEIT.

School Law: MANDAMUS. One B., moderator of a school district, refused to sign a report to the county clerk of the lawful taxes voted by his district at the annual meeting. *Held*, That it being a duty enjoined by law, he would be compelled by mandamus to sign the same.

ORIGINAL application for peremptory writ of mandamus.

Davidson & Easterday, for relator.

No appearance for respondent.

MAXWELL, CH. J.

This is an application for a peremptory writ of mandamus. The relator alleges in his application that he is a resident of and tax-payer in school district number sixty-seven, of Johnson county, and that the defendant is moderator of said district; that at the annual meeting held in April last, in said district, the legal voters thereof determined by vote that three mills on the dollar on the assessed valuation should be levied on the taxable property in said district for repairs of the said school house therein, and five mills for the payment of teachers' wages, and that school should be taught in said district eight months during the ensuing year; that on the 7th day of May, 1881, the relator, as director of said district, prepared a report in writing of the aforesaid taxes voted by said district, and after signing the same himself, requested the defendant to sign the same, which he refused to do or to sign any other report showing the taxes voted by said district, and that in consequence thereof, the taxes so voted cannot be reported to the county clerk of Johnson county, etc.

Section 11 of sub. II of "an act to establish a system of public instruction for the state of Nebraska," approved March 1, 1881, provides that "the legal voters at any annual meeting shall determine by vote the number of mills on the dollar of the assessed valuation which shall be levied for all purposes, except for payment of the bonded indebtedness and purchase or lease of school house, which number shall not exceed twenty-five mills in any year. The tax so voted shall

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be reported by the district board to the county clerk, and shall be levied by the county board and collected as other taxes." Laws 1881, 341. Comp. Stat., 457.

Section 1, sub. V, provides that "the moderator, director, and treasurer shall constitute the district board."

Section 2 provides that: "Immediately after the annual meeting, and not later than the first Monday in June, said board shall make and deliver to the county superintendent, and also to the county clerk of each county in which any part of the district is situated, reports in writing under their hands of all taxes voted by the district during the current school year to be levied on the taxable property of the district," etc.

Section 645 of the code provides that the "writ of mandamus may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty, resulting from an office, trust, or station." That a clear and specific duty of a ministerial nature is required by law of the defendant as a member of the district board is unquestioned, and mandamus is the appropriate remedy to compel the performance of such duty. A peremptory writ is therefore awarded.

JUDGMENT ACCORDINGLY.

11	361
55	688

W. H. ROGERS AND OTHERS, PLAINTIFFS IN ERROR, V.
RUSSELL & Co., DEFENDANTS IN ERROR.

1. **Appeals from County Courts.** Appeals from the judgments of county courts are regulated by the law governing appeals from the judgments of justices of the peace.

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3. ———. In all cases not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace, to the district court of the county where the judgment was rendered. Civil Code, sec. 1006.
2. **Final Judgment.** A judgment dismissing an action, and for costs in favor of the defendant, is a final judgment, and may be appealed from.

ERROR to the district court for Gage county. Tried below before WEAVER, J.

W. H. Ashby, for Plaintiff in error, cited *Irwin v. Croxton*, 3 Neb., 453. 3 Dallas, 321. 7 Cranch, 108. 9 Howard, 314. *French v. People*, 77 Ill., 537. 4 Neb., 569. 5 Neb., 567.

Bush & Rickards, for defendant in error, cited *Wilson v. Shorick*, 21 Iowa, 298. 3 W. L. M., 141. *Hathaway v. Jones*, 20 Ark., 109. *Riddle v. Yates*, 10 Neb., 510. *Nichols v. Hail*, 5 Neb.

LAKE, J.

The defendants in error were plaintiffs below, and commenced their action in the county court on two promissory notes given to them by the plaintiffs in error. That court, on motion of the plaintiffs in error, dismissed the action, and rendered judgment accordingly in their favor, from which Russell & Co. appealed to the district court.

In the district court the plaintiffs in error moved to dismiss the appeal "for the reason that the said cause was not tried in the court below," having been dismissed as above stated. This motion was overruled, leave taken to plead generally, but no further appearance being made on behalf of the plaintiffs in error, judgment on default of answer was rendered against them for the amount claimed by the petition. From that judgment this proceeding in error is prosecuted.

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The only point made by the attorney for plaintiffs in error in his brief is, that an appeal did not lie from the county to the district court, and consequently that the latter court erred in overruling the motion to dismiss the appeal, and was itself without jurisdiction.

The judgment of the county court was not for costs merely, but was a dismissal of the action also. It was a final disposition of the case, and had no appeal been taken therefrom, it would have been a complete bar to another action on the notes. The cases cited by counsel, therefore, to the effect that an appeal from a judgment for costs merely will not lie, are not applicable.

Appeals from the judgments of county courts are regulated by the law governing appeals from the judgments of justices of the peace. Sec. 1,006 of the code of civil procedure provides that: "In all cases not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered."

The district court had jurisdiction therefore, and the judgment being in accord with the facts and prayer of the petition, is not erroneous, and must be sustained.

JUDGMENT AFFIRMED.

THOMAS HUFF, PLAINTIFF IN ERROR, V. RUEL NIMS &
Co., DEFENDANTS IN ERROR.

11	363
16	537
11	363
31	127
11	363
40	808
41	256
11	363
48	766

1. **Verdict of Jury on Conflicting Testimony.** Where there is conflicting testimony as to the genuineness of a written instrument, and the question has been fairly submitted to the decision of a jury, their verdict should not be disturbed.

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2. **Witnesses: CROSS-EXAMINATION: HANDWRITING.** The defendant, having denied the genuineness of the promissory note on which the action was brought, called his son as a witness, who testified in chief that certain words in the note which his father actually gave were written by himself. On cross-examination he was required to write the same words in the presence of the jury, for their inspection and comparison with the note in controversy. *Held*, competent evidence and proper cross-examination of the witness.

ERROR to the district court for Richardson county. The action there was on a promissory note given by Huff to one Byrne, and by the latter assigned to plaintiff. Trial below before WEAVER, J., and a jury. Verdict and judgment for plaintiff, and Huff, defendant, brought cause here on a petition in error.

George P. Uhl, for plaintiff in error, cited 3 Greenleaf Ev., sec. 106, note 1. 1 Chitty Pleading, 488, note 2.

A. R. Scott and *C. Gillespie*, for defendants in error, cited Gen. Stat., 583, sec. 344. *Myers v. Toscan*, 3 N. H., 67. *Reid v. The State*, 20 Georgia, 681. *Clark v. Wyatt*, 15 Ind., 271.

LAKE, J.

The sole question in controversy in the court below was as to the identity of the note sued on, the plaintiff in error contending that it was not the one he had given. This question was fairly tried, and decided by the jury, and we think rightly; at all events, no case is presented which would justify the court to set their verdict aside.

There was, it is true, considerable conflict in the testimony, two or three witnesses on each side giving conflicting statements, but in view of the concession by the plaintiff in error that he had given a note about

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the time of the date of this one, maturing at the same time, for the same amount, and payable to the same party, we are of opinion that it was decidedly in favor of the conclusion reached by the jury. Therefore the objection that the verdict is not supported by the evidence is not sustained.

The only other point relied on worthy of attention is the alleged error in requiring the witness Huff to write certain words in the presence of the jury, and for their inspection and comparison with the same words contained in the note on which the action was brought.

This witness had testified in chief, on behalf of his father, that these words in the genuine note were in his own handwriting, while those in the one then in evidence were not. In view of this testimony, the handwriting of the witness was made an important factor in the case, and it was certainly competent for the defendant in error to disprove his oral statement as to the words of the note then before the jury. This could be done in various ways, one of which was by a comparison of the writing of the note with other writing either admitted or proved to be his own. That written in the presence of the court and jury was certainly his own, and ought to have been acceptable to the witness and the party calling him. If not dissembled—and of the possibility of this the party conducting the cross-examination took the risk—the writing thus exhibited enabled the jury to form a pretty accurate estimate of the value of the witness's oral testimony on this point. And the jury were competent to make the comparison between the writing in the note and that made in their presence, either with or without the aid of experts. There was no error in the ruling of the court on this point, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, PLAINTIFF IN ERROR, V.
DANIEL LYDICK, DEFENDANT IN ERROR.

1. **Liquor License not Assignable.** E. P. held a license from the city to retail malt, spirituous, and vinous liquors. He sold out his stock in trade, furniture, and fixtures to the defendant, and assigned his said license to him. *Held*, that such license so assigned to him was no defense to an indictment against defendant for selling such liquors "without first having obtained a license therefor."
2. **A License issued contrary to the statute** confers no authority to vend malt, spirituous, or vinous liquors. E. P. held a liquor license issued under the authority of the mayor and council of F. City. He sold out his saloon and assigned his license to the defendant, who petitioned the mayor and council to transfer the said license to him. The council thereupon ordered the said license to be transferred to the defendant. The city clerk thereupon issued an original license (in form) to the defendant, who proceeded to retail spirituous liquors under it, and was indicted therefor. *Held*, that such license was no defense to such indictment.

ERROR to the district court of Richardson county.
Tried below before WEAVER, J.

W. H. Morris, district attorney, for the State.

No counsel for defendant.

COBB, J.

This case is brought to this court under the provisions of secs. 515, 516, criminal code [Comp. Stat., 741], by the district attorney of the first district, for the purpose of settling the law of the question or questions involved therein.

It appears from the agreed state of facts preserved in the bill of exceptions that: "1st. One Eli Plant, on May 1, 1880, received a liquor license for one year, in Falls City, a city of the second class, in Richardson Co.

* * * * * 3d. August 2, 1880, defendant pur-

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chased Plant's saloon and business, and on that day filed with the city clerk a petition, signed by himself only, asking for a transfer of the said license theretofore issued to Plant to himself. 4th. That said petition remained unacted upon until the sixteenth of August, when the council met pursuant to their adjournment of Aug. 2, and duly ordered the license of Eli Plant to be transferred to the defendant. 5th. That before the above proceedings the said city council had passed an ordinance declaring that no person should have a license to retail liquors unless he had complied with the requirements of the revised (?) statutes, and that upon payment of \$5 a liquor license could be transferred if the city council so ordered. 6th. That the city clerk, acting under the order of the council as made intending to transfer the license of Eli Plant to defendant Daniel Lydick, issued to defendant a paper, which, on its face, purported to be a regularly issued license, but which the clerk intended, and the defendant understood was to be but a transfer of Eli Plant's license for its unexpired term. 7th. That the defendant never filed with the city clerk or any other authorized or designated party, any petition signed by ten freeholders, certified as required by law, or any other petition except the one filed by him Aug. 2, 1880, with the city clerk, requesting a transfer to defendant of Eli Plant's license for its unexpired term. 8th. That the defendant never paid to the city treasurer or any other person any sum whatever for license to sell liquors in Falls City, except the money which defendant paid to Eli Plant for the pro rata amount of his unexpired license. * * * * 10th. That the grand jury at March term, 1881, of the district court, presented an indictment against the defendant, said Lydick, for selling malt and spirituous liquors in the city of Falls City, without having complied with the conditions and

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obtained a license as required by law. 11th. That the selling was not denied and was proven as laid in the indictment. 12th. That the paper purporting to be a license as aforesaid was, over the objection of the state, admitted to the jury as evidence."

The district attorney prayed the court to give in charge of the jury the following instructions:

"*First.* The jury are instructed that if they find that the city council transferred the license of Mr. Plant to the defendant, and granted the defendant no other license, then that transfer will not protect him, defendant, in selling malt, vinous, and spirituous liquors in Falls City.

"*Second.* If the jury find that the city council ordered the transfer of Plant's license to defendant, and instead thereof, the city clerk without authority issued a license in form, that the same is without authority and does not protect defendant."

Which prayer the court refused, and in effect directed the jury to acquit the defendant.

The several statutory provisions applicable to the question under consideration, prior to June 1, 1881, are as follows: Chap. LIII. of the code of criminal procedure. Gen. Stat., 851.

Sec. 572. The county commissioners of any county in this state may, at any regular session of said board of commissioners, grant and issue a license for the sale of malt, spirituous, and vinous liquors, to any person or persons who shall comply with the following conditions:

First. The applicant for a license shall file with the county clerk the petition of at least ten freeholders of the precinct in which he resides, signed and attested before a justice of the peace, or other competent officer, setting forth that the applicant for license is a man of respectable character and standing, and a resi-

dent of this state, and praying that a license may issue to him.

Second. The applicant shall at the same time file with the county clerk his bond to the county, in the sum of not less than five hundred dollars, nor more than five thousand dollars, with good and sufficient security, to be approved by the county commissioners, conditioned, that during the continuance of his license he will not keep a disorderly house; that he will not allow gambling with cards, dice, or any other implements or devices used in gambling, within his house or within any outhouse, yard, or other premises under his control, and for the payment of all damages, fines, and forfeitures which may be adjudged against him under the provisions of this chapter.

Third. The applicant shall pay into the county treasury, for the use of the school fund, to be distributed as other moneys, the sum of not less than twenty five dollars, nor more than five hundred dollars, at the discretion of the county commissioners, and file the treasurer's receipt therefor in duplicate with the county clerk, before such license shall be issued.

SEC. 573. No license shall be issued for a longer period than one year, nor for a less period than six months, and shall specify particularly the place where the person obtaining the license intends selling liquor during the continuance of said license, which said license shall be in the following form, as near as can be, making changes to suit each case.

SEC. 574. Any person licensed as before provided, who shall give or sell any malt, spirituous, or vinous liquors, or other intoxicating drinks, to any minor or apprentice, or servant under twenty-one years of age, without the consent of the parents, guardian, or master thereof, shall forfeit and pay for each offense the sum of twenty-five dollars, for the use of the school fund.

SEC. 575. Any person so licensed who shall sell any intoxicating liquor to an Indian, insane person, or idiot, shall be subject to a fine of not less than fifty dollars for every such offense.

SEC. 576. The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic; he shall support all paupers, widows, and orphans, and the expenses of all civil and criminal prosecutions growing out of, or justly attributable to his retail traffic in intoxicating drinks; said damages and expenses to be recovered in any court of competent jurisdiction by any civil action on the bond named and required in sec. 572.

Section 586 provides that all the powers and duties in said chapter "devolving upon the county commissioners shall belong to and be exercised exclusively by the proper authorities of any or all incorporated towns and cities of this state within the incorporated limits thereof;" provides "that such incorporated cities and towns may require such additional sum to be paid for license under this chapter as to them may seem best, not to exceed one thousand dollars."

Sections 1 and 2 of an act entitled "An act to regulate the issuance of license," etc., approved Feb. 25, 1875, provides that "all applications for license to sell malt, spirituous, and vinous liquors, in the state of Nebraska, made to commissioners of any county, or council of any city in this state, shall lie over for the space of two weeks before action is taken thereon, when, if there be no objection in writing made and filed to the issuance of said license, and the provisions of chap. 53 of the code of criminal procedure have been fully complied with, it may be granted. If there be any objection, protest, or remonstrance filed in the office where the application is made against the issuance

of said license, the county commissioners or city council shall appoint a day for a hearing of said case, and if it shall be satisfactorily proven that the applicant for license has been guilty of the violation of section 572, 574, and 575 chap. 53 of the code of criminal procedure, or any other restrictions now legally placed upon the sale of malt, spirituous, and vinous liquors, within the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of this state, then the board of county commissioners or council of any city shall refuse to grant said application for license," etc. Laws 1875, 24.

Among the powers granted to cities of the second class, by the act of March 1, 1879, is: "to license, regulate, and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license. * * * *Provided further*, that in granting licenses, such corporate authorities shall comply with whatever general laws of the state may be in force relative to the granting of licenses." Laws 1879, 212. [Comp. Stat., 115.]

An examination of the above provisions of law, can scarcely fail to satisfy any one that the people of this state have reserved to themselves, acting through the several local boards, county and city, the right to discriminate between the different applicants for liquor licences, to license such applicants as upon the principles laid down should be deemed worthy, and refuse those who, upon the application of the same principles, should be held to be unworthy. A licensee, under the above provisions, accepts from the authorities a personal trust and assumes personal duties and responsibilities quite repugnant to the idea of his selling his license along with his stock on hand, furniture and

fixtures. Under statutes much less discriminating than ours, it has been held by the courts of Kentucky, Indiana, Delaware, Alabama, Louisiana, Pennsylvania, New York, and other states, that a liquor license is a personal trust or permit, and is incapable of assignment. In some cases it has been held that the privilege of selling intoxicating liquors was of so personal a nature that it could not be exercised through an agent. But I think that as long as the original licensee is in a position to respond to all damages and penalties, civil and criminal, imposed by the statute upon vendors of liquors or connected with or growing out of such traffic, he may carry on the business through an agent. But he must be in such position that the acts of such agent, in respect to the business, will in law be his acts, and for which he and his bondsmen will be held responsible.

The act of March 1, 1879, above referred to, is the charter of the city of Falls City, as well as of all other cities of the second class and villages, in this state, and all official acts of the mayor and council of said city, not expressed in or fairly intended by the provisions of said act or some other general law of the state applicable thereto, are *ultra vires* and void.

The mayor and council had the power to grant a license to the defendant only upon his complying with the terms and conditions, doing the acts prescribed in the provisions of law above quoted for applicants for licenses, and in the case at bar it was the duty of the court to have enquired whether the simulated license which the defendant held was issued upon such terms or not.

The instructions prayed by the district attorney express the law of this case, so far as they go, and ought to have been given in charge to the jury.

The court erred in instructing the jury "that the

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license introduced in evidence is sufficient to justify the defendant for selling the liquor charged in the indictment."

The following authorities were considered in coming to the conclusions indicated above: *Thompson v. State*, 37 Ala., 151. *State v. Prettyman*, 3 Harr. (Del.), 570. *Gault v. State*, 34 Ga., 533. *Godfrey v. State*, 5 Blackf. (Ind.), 151. *Pickens v. State*, 20 Ind., 116. *Runyon v. State*, 52 Id., 320. *Shaw v. State*, 56 Id., 188. *Barns v. Commonwealth*, 2 Dana (Ky.), 388. *Gray v. Commonwealth*, 9 Id., 300. *Krant v. State*, 47 Ind., 519. *Commonwealth v. Bryan*, 9 Dana, 310. *Commonwealth v. Bramon*, 8 B. Monroe (Ky.), 374. *Roberts v. O'Connor*, 33 Maine, 496. *Hays v. State*, 13 Mo., 246. *State v. Bryant*, 14 Id., 340. *Long v. State*, 27 Ala., 32. *Lewis v. United States*, Morris (Ia.), 199. *Stokes v. Prescott*, 4 B. Mon. (Ky.), 37. *Mayby v. Bullock*, 7 Dana, 337. *Gibson v. Kauffield*, 63 Pa. St., 168. *United States v. Overton*, 2 Cranch C. C., 42. *Commissioners v. Dougherty*, 55 Barb., 332. *The People v. Acton*, 48 Id., 527. *Hang v. Gillett*, 14 Kan., 140. *Fell v. State*, 42 Md., 71.

JOB BUCHANAN, PLAINTIFF IN ERROR, V. CHARLES G.
DORSEY AND OTHERS, DEFENDANTS IN ERROR.

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1. **Act for the Relief of Occupying Claimants.** To proceed regularly under the "act for the relief of occupying claimants," no step should be taken until final judgment in the action against such claimant has been entered.
2. —: **ESTOPPEL.** Where a party in an action of ejectment elects to institute proceedings under the above mentioned act, he is estopped from seeking relief by proceedings in error against the judgment in the former action.

THE defendants in error brought their action in the district court of Gage county to recover possession of lot three, in block sixty-five, in the city of Beatrice, and to recover rents and profits thereof. The plaintiff in error in his answer claimed title to the premises under a tax deed dated Feb. 11, 1868, made and recorded more than ten years prior to the commencement of this suit, and also set up the occupying claimants' law. The case was tried once, finding and judgment set aside, new trial granted, case continued until next term, at which time it was again tried by a jury, who found the defendants in error to be the owners of and entitled to the possession of said premises. The plaintiff in error moved to set aside the verdict and for a new trial, which motion was overruled. Thereupon the plaintiff in error, by his counsel, asked that a jury be impaneled to assess the value of the lasting and valuable improvements made by him as occupying claimant, as provided by law, which motion the court sustained, and a jury was duly impaneled and sworn as provided under the occupying claimants' act, and the cause in that behalf having been submitted to them, the jury found that the value of the valuable and lasting improvements on said premises was the sum of \$935.80; that the value of said lot without the improvements was \$575.08; that the net annual value of the rent of said lot from the time of notice to surrender possession was \$53.94. Thereupon the defendant in error in open court elected to pay for said improvements, and judgment was rendered in accordance with the verdict under the occupying claimants' act. To review these proceedings the cause was brought here upon a petition in error.

Lamb, Billingsley & Lambertson, for plaintiff in error, argued entirely upon the admissibility of the evidence

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under which defendants in error claimed title, and claimed error in the exclusion of tax deed offered by plaintiff in error to sustain his claim of title.

Colby & Hazlett, for defendants in error, cited Bigelow on Estoppel, 508.

LAKE, J.

In the view we take of this case our disposal of it must turn upon the decision of a single question, viz., the first raised in the brief of counsel for the defendants in error, which is, that Buchanan, by asking for and obtaining relief at the hands of the court against the successful plaintiff below, under the "act for the relief of occupying claimants," waived all objections to the verdict and judgment against him, of which he now complains. And our decision of this question must be in accord with what we believe was the intention of the legislature in passing that act.

Section three (Gen. Statutes, 501) provides "that the court rendering judgment in any case provided for by this act, against the occupying claimant, shall, at the request of either party, cause a journal entry thereof to be made, and thereupon a jury shall be impaneled by the court in the usual manner provided by law in civil cases."

By following sections, the jury thus impaneled are required "to view the premises in question, and then and there, on oath or affirmation, assess the value of all lasting and valuable improvements," contemplated by the first section of the act; also all "damages, if any, which the said land may have sustained by waste," etc., and report such finding to the clerk of the court at the appointed time, and on this verdict the court is required to render the proper judgment, as in other cases.

A careful examination of the several provisions of this statute leads us to the conclusion that, in the orderly enforcement of it, final judgment in the action against the "occupying claimant" should be rendered prior to the taking of any steps for the ascertainment of the value of his improvements. In other words the action for the recovery of the land should be first concluded, and the rights of the parties to it finally determined by judgment duly entered of record. And until this is done, there is no foundation for taking a single step, except it be by consent of parties. To all intents the proceedings authorized by this statute is a new action. It requires the calling of a new jury, puts the parties to the trouble and involves them in the expense of another trial of the questions entirely foreign to those presented in the action for the land.

The record before us shows the proceedings under the relief act to have been somewhat premature and rather irregular, but there is nothing in this particular to affect our present decision. It seems that at once upon the return of the verdict, finding the defendants in error entitled to the lot, and before judgment thereon, the plaintiff in error moved for a jury to assess the value of his improvements as an occupying claimant. By consent of both parties, the same jury that had just served in the ejectment suit, was called, and, after trial had, made a finding, of which no complaint has been heard, in favor of the plaintiff in error, for eight hundred and eighty dollars and eighty cents, for which amount judgment was duly rendered in his favor. After asking and receiving all this at the hands of the court, on the strength of the result of the former action, should he be permitted to question its correctness? As we think, very clearly not. If he believed that the result was unjust and erroneous, and

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desired a review of the proceedings by which it was brought about, he should have taken no step showing a voluntary acquiescence therein, but at once pursued the course open to him by petition in error. This, however, he did not do, but elected to recognize its binding force by seeking and obtaining relief under it. Having done this he is now estopped from seeking relief by proceedings in error.

JUDGMENT AFFIRMED.

WILLIAM W. MILLER, APPELLEE, v. OLIVER P. HURFORD ET AL., AND REDICK & CONNELL, APPELLANTS.

1. **Constitutional Law.** When the title of an act is to amend a particular section of a statute, the proposed amendment must be germane to the subject matter of the section sought to be amended or it will be void.
2. **Bills.** A bill retained by the governor for more than three days while the legislature was in actual session, thereby became a law under section 19, Art. III, of the constitution of 1867, notwithstanding that soon after it was presented to him for his approval, the legislature adjourned from the 29th of March to the 30th of May of that year. The constitutional restriction applies to an adjournment *sine die*, and not to one from time to time.
3. **Taxes: FORECLOSING LIEN.** An action to foreclose a tax lien may be maintained upon failure of the tax title after the time for redemption has expired, and it is unnecessary before bringing such action to test the validity of the tax deed by an action at law.

APPEAL from a decree rendered by Savage, J., of the district court for Douglas county.

E. Estabrook and W. J. Connell, for appellants, cited *Peet v. O'Brien*, 5 Neb., 362, 365. *Wemier v. Porter*,

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13	264
15	826
16	221
16	286
16	287
11	377
35	305
11	377
37	347
11	377
42	463
11	377
59	235
53	525
11	377
60	427

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4 N. W. R. (Mich.), 306. The remedy of foreclosure was repealed by act of 1879, sec. 183, p. 349. Saving clause saves only rights, not remedies. Sedgwick on Statutory and Constitutional law, 108. *Bennett v. Hargus*, 1 Neb., 419. *Van Inwagen v. Chicago*, 61 Ill., 31. *Hunt v. Jennings*, 5 Blackf., 195. *Sturges v. Cronmirchild*, 4 Wheat., 122. The act of 1871, sec. 7, Gen. Stat., 936, and the act of 1875, p. 107, are unconstitutional and void. *Sovereign v. The State*, 7 Neb., 410. *Smails v. White*, 4 Neb., 353. *City of Tecumseh v. Phillips*, 5 Neb., 810. *People v. Mahanay*, 13 Mich., 494.

John D. Howe, for appellee, cited *People v. Hatch*, 19 Ill., 283. *Cooley Const. Lim.*, 152, and cases cited. *People v. Bowen*, 30 Barb., 24. *Opinion of Judges*, 45 N. H., 607. *Opinion of the Judges*, 99 Mass., 636.

MAXWELL, CH. J.

This is an action to foreclose certain tax liens. The plaintiff alleges in his petition that he purchased the east one-half of the north-east quarter of the north-west quarter of section 22, township 15 north, range 13 east in Douglas county, being five acres of ground situate in the city of Omaha, on the twenty-ninth day of January, 1876, for the taxes due thereon for 1874, amounting to the sum of \$115.32, and for the taxes for the year 1873, amounting to the sum of \$67, and on the ninth of November, 1877, for the taxes of 1876, amounting to the sum of \$107.34, and that as purchaser of said land he paid other taxes thereon as follows:

January 29, 1876, county and state taxes for the year 1876, \$359.14.

January 26, 1876, county and state taxes for 1871 and 1872, \$261.

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August 21, 1876, county and state taxes for 1875, \$62.60.

October 31, 1878, county and state taxes for 1877, \$52.70.

October 31, 1878, city taxes for 1877, \$59.16.

The total amount being the sum of \$1,141.21.

That certificates of purchase were duly issued to the plaintiff, which, on or about the first day of February, 1878, were surrendered to the treasurer of said county, and tax deeds in due form were issued and delivered to him, which were afterwards duly recorded. That at the February, 1879, term of the district court of Douglas county, in an action to obtain possession of said land, it was held that the plaintiff's title to said land under said deeds had failed, and the plaintiff waives all claim of title to said land by virtue of said deeds, except to and for a lien of the taxes paid as aforesaid, and that no part of the same has been paid, etc.

The defendants Redick and Connell in their answer admit that the plaintiff purchased the lands in controversy on the twenty-fourth of January, 1876, "for certain pretended county, state, and city taxes claimed to have been levied for the year 1874, and also admit the purchase for the years 1873 and 1876, and that he received certificates of purchase and afterwards tax deeds, which were duly recorded. That on the twenty-eighth of May, 1878, the plaintiff commenced an action of ejectment against the owners of said land, which came on for trial on the third of May, 1879, and that said plaintiff intentionally and purposely submitted said cause to said court and jury without offering said deeds or either of them in evidence, and without offering any proof whatever in relation to said deeds, or their contents to said tax purchaser or payments, and nowhere did it appear in the pleadings in said cause or in any

of the tax proceedings or the record thereof that the validity of said tax deeds or the title of said plaintiff acquired by reason of said purchases at treasurer's sale was in any way involved," etc. That after the expiration of three days from the rendition of the judgment, no attempt being made to vacate the same, the defendants Redick and Connell purchased said premises from the Hurfords, and received warranty deeds of conveyance. It is alleged in the answer, and denied in the reply, that the Hurfords had a sufficient amount of personal property in Douglas county, during the time for which the taxes were delinquent, from which the aforesaid taxes could have been collected. They deny that there was any legal or valid assessment or levy of taxes on said real estate in the years named.

On the trial of the cause, a decree for the sum of \$1,688 was rendered in favor of the plaintiff. The defendants Redick and Connell appeal to this court.

In 1871, the following amendment to the revenue law of 1869 was passed (Laws of 1871, p. 82): "Whenever the title acquired by a purchaser of real estate at treasurer's sale shall fail, the purchaser at such sale, or his heirs or assigns, shall have a lien on the real estate so purchased for the full amount of the purchase money, together with interest thereon from the date of such purchase at the rate of forty per cent per annum, until the same is fully paid, and such purchaser, his heirs, or assigns, may pay all taxes lawfully assessed on such real estate *after* such purchase, and when the said title shall fail may have a lien for all such taxes, together with interest thereon from the time of payment at the rate aforesaid. The lien hereby created may be enforced in the manner directed by law for foreclosing mortgages." Gen. Stat., 936.

This act was not signed by the governor, but is certified by the presiding officers of the senate and house

of representatives. It is objected that the senate and house adjourned before the expiration of three days from the time the bill was presented to the governor for his approval. It appears from the journals of the two bodies that the adjournment was had from the twenty-ninth of March, 1871, to the thirtieth of May, of that year, and that the governor had possession of the bill for more than three days while the legislature was in session, it being retained until June 6, 1871, the legislature being in session from May 30th. The provisions of section 19, art. III, of the constitution of 1867, apply to adjournments *sine die*, and not to adjournments from time to time. But an amendment must be germane to the subject matter of the act or section to be amended. Our constitutional provision that "no bill shall contain more than one subject, which shall be clearly expressed in its title," is but making inviolable the rule governing legislative bodies, that "no proposition or subject different from that under consideration shall be admitted under color of amendment." Experience has shown that in the absence of constitutional restrictions, the rule at times is liable to be overthrown, and objectionable and pernicious legislation is the result. To guard against this evil, our constitution prohibits more than one subject being embraced in a bill. And while this provision has sometimes been attended with inconvenience, as in case of a revision of the laws, it is a safeguard against corrupt or improvident legislation, and its effect has been to simplify legislation and place every bill upon its true merits. But if, under the pretext of *amending* a section, a subject entirely foreign to the subject matter of the section to be amended can be introduced, this barrier will be entirely broken down and the constitutional guaranty in effect destroyed.

The subject-matter of section 51 is to make taxes

upon real property a perpetual lien thereon against all persons and bodies corporate except the United States and this state. Any amendment to the section in relation to the lien or the mode of enforcing it is valid. But extraneous matter not relating to the subject of the section is in no sense an amendment, is within the inhibition of the constitution, and void. *White v. The City of Lincoln*, 5 Neb., 516. *City of Tecumseh v. Phillips*, Id., 305.

In the year 1875 an act to provide the mode of foreclosing tax liens upon real estate in certain cases was passed. Laws of 1875 page 107. This act merely regulates the procedure and requires the action to be brought within five years from the date of the sale, and is not an amendment. The rule laid down in *Smails v. White*, 4 Neb., 355, and *Sovereign v. The State*, 7 Id., 410, therefore does not apply.

The proper construction of the act of 1875 was before this court in the case of *Peet v. O'Brien*, 5 Neb., 360, and it was held that the action could not be maintained until after the expiration of the time limited for redemption, nor until the title failed. The theory of our revenue law is, that the purchaser at tax sale buys the land. He does not make a mere loan of the money paid, to be repaid at a high rate of interest, but he purchases the land subject to the right of redemption at any time within two years. Until the time for redemption has expired no proceeding can be instituted by him to divest the title of the owner of the fee. It is not the policy of the law that any one should forfeit his estate, because from misfortune or neglect he has failed to meet the burdens imposed by the government upon his property, by a particular day. And the right of redemption is favored in equity as being in furtherance of justice, and is liberally construed. But on the other hand the burden of govern-

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ment must be borne by the property within its jurisdiction. These burdens are intended to be imposed equally upon the property of all. If the property of A is liable for taxes thus imposed upon it, there is no reason why the property of B should not also be liable. The law therefore provides for the sale of the real property for the delinquent taxes due thereon. But the authority to sell land for taxes is a naked power, and the officer entrusted with it merely exercises a naked special authority which must be strictly complied with. It follows, therefore, that before the title will pass by a tax deed under such sale, there must have been a substantial compliance with the law in all the proceedings which have led to it. Cooley on Taxation, 34. Blackwell on Tax Titles, 34, and note 2.

Judge Cooley says: "Tax sales are made exclusively under a statutory power. The officer who makes them, sells something he does not own, and which he can have no authority to sell except as he is made the agent of the law for that purpose. But he is made such agent only by certain steps which are to precede his action, and which, under the law, are conditions to his authority. If these fail, the power is never created. If one of them fails it is as fatal as if all failed. Defects in the conditions of a statutory authority cannot be aided by the courts; if they have not been observed, the courts cannot dispense with them, and thus bring into existence a power which the statute only permits when the conditions have been fully complied with." Cooley on Taxation, 324.

A failure of title through a tax deed therefore follows as a consequence, if any of the essential steps in the tax proceedings have not been complied with,—that is, the power to make the deed never in fact existed, and therefore no title passed by its execution.

The want of power may appear on the face of the deed as in the case of a failure to recite the place where the tax sale was made. *Haller v. Blaco*, 10 Neb., 36. Or by the omission of the county seal, *Sutton v. Stone*, 4 Id., 321. Or the deed may be valid on its face, but invalid from the omission to take some essential step in the proceedings. In all these cases no title passes, and it seems unnecessary to require the purchaser to go into a court of law and have his title declared void before instituting proceedings to foreclose. The failure of title flows from the defect in the tax proceedings and not from the judgment of the court. If, therefore, there is a failure of title and an action to foreclose the lien is instituted, and it is alleged in the petition that the title has failed, issue may be taken upon that question, and if it is found that there is a valid subsisting tax deed upon which the claim of the plaintiff is founded the action must be dismissed at his costs.

In the case at bar the judgment for the Harbaughs in the action of ejectment was conclusive upon the defendant as to the invalidity of his title, and there is no claim in the answer that it is valid, as the defendants claim to be the owners of the land in controversy.

The revenue law of 1866 made taxes upon real estate a perpetual lien thereon, and this provision was retained in the revenue act of 1869, and in the subsequent legislation of this state upon that subject.

The act of 1871 gave the purchaser at tax sale a lien for the purchase money and interest in case his title failed, and also gave him a lien for such taxes as were lawfully assessed after such purchase. This provision doubtless was enacted to encourage bidding at tax sales by securing the purchaser from loss in case his title failed. The plaintiff has paid the taxes due

 Griggs v. LePoidevin.

on the defendant's land, and justice as well as the law requires that such money be repaid. No particular objection has been pointed out to the assessment or levy of taxes, and they appear to be valid. We are not entirely clear as to the right of the plaintiff to add the taxes paid for the years 1870 and 1871 to his claim, but no objection is made to the judgment on that ground.

The revenue law of 1879 did not repeal the right to foreclose tax liens. Comp. Stat., 437. The plaintiff is entitled to a decree for the money actually paid by him in purchasing said lands at tax sale, and for taxes necessarily paid upon such lands, together with interest upon the sums so paid at 12 per cent, and that said lands be sold as upon foreclosure of mortgage and the proceeds applied first to the payment of the amount due and costs, and the remainder, if any, to W. J. Connell.

JUDGMENT ACCORDINGLY.

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LOUIS T. GRIGGS ET AL., PLAINTIFFS IN ERROR, V. JOHN
LEPOIDEVIN ET AL., DEFENDANTS IN ERROR.

1. **Pleading: PETITION: MECHANIC'S LIEN.** A petition, good in an action for goods sold and delivered, will not be held bad on general demurrer in an action for lumber and other building materials, where the plaintiff also prays for a lien on a building.
2. **Error.** In all cases of error, not of a jurisdictional character, before the aggrieved party can be heard in a court of error, he should first seek relief at the hands of the court where the error has occurred.

THIS was an action to foreclose a mechanic's lien brought in the district court of Gage county by Le

 Griggs v. LePoidevin.

Poidevin & Co. against Griggs & Warner. The case was heard on demurrer to the petition before WEAVER, J., who overruled the same, and defendants failing to plead further, judgment was rendered against them, to reverse which they brought the cause here on a petition in error.

W. H. Ashby, for plaintiffs in error, cited 1 Parsons on Contracts, 8. 1 Chitty Pleading, 294-295. Phillips' Mechanic's Lien, 440-457. *Crawfordsville v. Barr*, 45 Ind., 258. *Randolf v. Overstoll*, 58 Ill., 52. 5 Johnson, 272. *Brown v. Lowell*, 79 Ill., 484. 1 E. D. Smith, 722. 2 E. D. Smith, 662. 1 Chitty Pl., 323-4. 14 B. Monroe, 83. 29 Barbour, 201. 10 Nebraska, 265.

Hale & Hardy, for defendants in error.

COBB, J.

The defendants below, plaintiffs in error, filed a general demurrer to the plaintiffs' petition, which was overruled, and their exception preserved in the record. In their brief they point out the alleged deficiency in the petition to consist in the want of "the facts showing a contract." Upon referring to the petition as set out in the record, I find that after setting up the partnership on the part of the plaintiffs and defendants, and other formal matters, it proceeds as follows: "The plaintiffs say that on, to-wit: the 6th day of September, 1880, they made a parol contract with the defendants to furnish to the said defendants, Griggs & Warner, a quantity of lumber and building material for a certain one-story house," etc. * * * "That under and by virtue of the contract aforesaid, the plaintiff furnished the lumber and building material," etc.

Sec. 1 of chap. 42 of the General Statutes, provides

that "any person who shall perform any labor, or furnish any material or machinery for the erection, reparation, or removal of any house, mill, manufactory, or other building or appurtenance by virtue of a contract or agreement express or implied with the owner thereof or his agent, shall have a lien," etc. I think the petition quite good for the purpose of enforcing a lien for building material. But suppose it was defective for that purpose, could such deficiency be taken advantage of by demurrer? I think not, if it be conceded that it is good as a petition for goods sold and delivered. And it is not suggested that it is defective for the latter purpose.

Plaintiffs in error also make the points in their brief that: "The court had no right to try the case without a jury." "The judgment was rendered without defaulting the defendants." "All the issues must be passed upon." And lastly, "the judgment is for more than is asked for by the petition."

It appears from the record that on the 30th day of April, 1880, the default of the defendants was entered for want of an answer, the plaintiffs proved up and judgment was rendered, etc., and on the same day, on motion and affidavits of defendants' attorney, the default and judgment were set aside and leave given to the defendants to answer in thirty days. On the 18th day of May, defendants filed a general demurrer to the petition. On the 14th day of October, the demurrer was argued, and on the 15th was overruled. The defendants excepted to said opinion of the court, but did not ask further time in which to answer. And on the 16th day of the same month, the third day of the term, final judgment was rendered. The journal entries do not show the proceedings to have been entirely regular, and had the proper steps been taken by the defendants for their correction in the court below, and with-

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out success, this court might consider it a proper case for reversal. But it has been often if not uniformly held that in all cases of error not of a jurisdictional character, before the aggrieved party can be heard in a court of error, he should first seek relief at the hands of the court where error has occurred. This the plaintiffs in error have failed to do. And for that reason, without specially approving of the proceedings as shown by the record, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

DAVID DORRINGTON, APPELLEE, v. PHILIP MYERS AND
OTHERS, APPELLANTS.

Homestead Exemption. Under the provisions of sec. 525 of the code of civil procedure, unaffected by amendment or subsequent legislation, D. entered into the contract upon which judgment was afterwards obtained and execution issued, he at that time residing with his sons and daughters on the property in question as a homestead. At the time of the attempted levy of the execution on the homestead, his wife had died, and not having remarried he was residing on the property as the head of a family consisting of a married son and his wife, the wife and children of another married son who was absent in the mining country, and one or more servant girls. *Held*, that D. was entitled to homestead exemption.

INJUNCTION to restrain defendants from selling, upon execution, property described in the petition, alleged to be the homestead of plaintiff. The cause was brought in the district court of Richardson county, and upon a hearing there before Weaver, J., decree was rendered in favor of plaintiff, from which defendants appeal.

C. Gillespie and *George P. Uhl* for appellants, cited *Thompson on Homesteads*, secs. 10, 40, 73, 291, 292,

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30 690

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43 700

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11 388
59 232
59 624

Dorrington v. Myers.

293. *Cooper v. Cooper*, 24 Ohio State, 488. *Gunn v. Barry*, 15 Wall., 610.

Isham Reavis and *E. W. Thomas*, for appellee, cited *Silloway v. Brown*, 12 Allen, 34. Thompson on Homestead, sec. 72. *Tyson v. Reynolds*, 52 Iowa, 431.

COBB, J.

It is well settled that the law in regard to exemptions, as well as that relating to stay of execution, valuation, or appraisement laws and other similar laws, in force when a contract is entered into, becomes the law of such contract. This principle has been often invoked by the creditor for his protection against the effect of subsequent legislation which has sought to enlarge the amount of exemptions, etc. But I know of no good reason why the rights of the debtor should not be equally under the protection of the law as those of the creditor. And if, as is certainly the case, the amount of property which the debtor is allowed to hold exempt and free from execution cannot be enlarged by a statute passed after the making of the contract, to satisfy which the execution is issued, neither ought it to be abridged or shorn of any of its protecting attributes by means of any such subsequent legislation. In the case at bar, the contract, for the satisfaction of which the homestead of the plaintiff is sought to be taken, was made while the homestead exemption provision as contained in the code of civil procedure was in force and unamended. Therefore, in examining the plaintiff's claim to homestead exemption in this case, we will only consider the law as it then stood, without regard to either of the three several statutes which have been since enacted on that subject.

The provisions of law above referred to, so far as the

same is necessary to an understanding of this case, are as follows: "A homestead consisting of * * * a quantity of contiguous land not exceeding two lots, being within an incorporated town or village, . * * owned and occupied by any resident of the state, being the head of a family, shall not be subject to attachment, levy, or sale, upon execution or other process issuing out of any court in this state so long as the same shall be owned and occupied by the debtor as such homestead.

"This section shall be deemed and construed to exempt such homestead, in the manner aforesaid, as well after as before the death of the debtor, and in the event of the death of the debtor, the estate in such homestead shall descend to, and be vested in, his heirs at law or legatees, free and divested from all claims, if any, of creditors thereto." Gen. Stat., 616.

The word family is defined by Webster to be "the collective body of persons who live in one house under one head or manager, including parents, children, and servants, as the case may be, lodgers or boarders."

It appears from the testimony preserved in the bill of exceptions, that while the provisions of the statute above quoted were in full force and unaffected by any amendment or subsequent enactment on that subject, the plaintiff occupied the premises in question with his family. That his family then consisted of his wife and several sons and daughters. It further appears that at the date of the attempted levy of the execution on the premises, the plaintiff was a widower, his wife having died in the meantime, and his family consisted of a married son with his wife, the wife and children of another married son who was temporarily absent in the mining country, and one or more servant girls.

Upon this state of facts and under the section of the statute quoted, the plaintiff was, at the date of the at-

 Johnson v. Dinsmore.

tempted levy, the head of a family and entitled to the benefit of the homestead exemption law as such.

While placing my views of this case upon the above ground, I by no means wish it understood that the plaintiff's right to homestead exemption depends upon the fact of his ability to provide for his son and daughters-in-law, and to hire servant girls. When as the head of a family he entered into possession of this homestead, he become vested, so to speak, of a homestead estate therein, which was alienable only by sale or abandonment. Neither the death of the wife, nor her abandonment of her husband, nor the arrival at full age and departure from the parental roof of all the sons and daughters, would have the effect of dismantling the homestead of the protection of the exemption law. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

OAKLEY JOHNSON, PLAINTIFF IN ERROR, V. JOHN B.
DINSMORE AND OTHERS, DEFENDANTS IN ERROR.

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14	273
22	362
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27	719
11	391
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1. **Practice: CONTINUANCE: NEW TRIAL.** While an application for a continuance is addressed to the discretion of the court, yet where a party has been diligent, and it appears that there has been an abuse of discretion, operating to his prejudice in the final determination of the case, a new trial will be granted.
2. **—: EVIDENCE: INSTRUCTIONS.** Where, under the issue made by the pleadings, proof of a material fact devolves on the defendant, and no testimony is offered on either side, it is error for the court to instruct the jury to find for the defendant.

ERROR to the district court for Clay county. Tried below before **WEAVER, J.**

Rittenhouse & Hurd and *Hayes & Steele*, for plaintiff in error, cited *Purrington v. Frank*, 2 Iowa, 565. *State v. Rorabacher*, 19 Iowa, 155. *State v. Painter & Lindley*, 40 Iowa, 298. *Knox v. Arnold*, 1 Wis., 70. Brightley's N. Y. Digest, 2, 8117, 8118. *Allegre v. Md. Ins. Co.*, 6 Harris & Johnson, Md., 408.

Brown, Ryan & Brown, for defendants in error, cited *Bone v. Hillen*, 1 Treadway (S. C.) Const., 198. *Kelly v. Saunders*, 35 Mo., 200. *Doe v. Johnson*, 3 Ill. (2 Scam.), 522. *Babcock v. Hill*, 35 Barbour, 52. *Pulliam v. Webb*, 26 Texas, 95. *Foushee v. Lea*, 4 Call (Va.), 279. *Thurman v. Virgin*, 18 B. Mon. (Ky.), 785. *McGinnes v. McGinnes*, 23 Ga., 613. *Hensley v. Lytle*, 5 Tex., 497. *Moore v. Goelitz*, 27 Ill., 18. *Day v. Gelston*, 22 Ill., 103. *State v. Cross*, 12 Iowa, 66. *Mackubin v. Clarkson*, 5 Minn., 242. *Freeland v. Howell*, Anth., N. Y., 198. *Crites v. Lanier*, 1 Taylor, 16. *Post v. Wright*, 1 Caines (N. Y.), 111. *Peebles v. Rales*, 1 Littell (Ky.), 26.

MAXWELL, CH. J.

In 1878, the plaintiff commenced an action against the defendant and others, in the district court of Clay county, to recover the sum of \$2,034 damages for certain goods levied upon and sold by the defendant Dinsmore, as sheriff of said county. The defendant in his answer alleges that in October, 1874, two actions were commenced in said court against E. W. Grinnell, one to recover the sum of \$283.96, and the other the sum of \$1,000, with interest; that attachments were issued against the property of said Grinnell in said actions and placed in the hands of the defendant, as sheriff, who thereupon levied upon said property as the goods and chattels of said Grinnell; and that afterwards judgments were recovered in said actions and said

attached property sold under the order of the court, and the proceeds of said sale paid into court for the satisfaction of said judgments. The plaintiff in reply alleges that after the levy of said attachments, said Grinnell compromised with his creditors by executing and delivering to a trustee for them, certain promissory notes secured by mortgage on property belonging to the separate estate of the wife of said Grinnell, and that thereupon the property in question was released, and afterwards sold to one Sawtelle. The answer of the defendant was filed on the thirteenth day of October, 1879, which, as is conceded, was out of time and without leave of court. No motion to strike the answer from the files was made, but on the fifteenth day of November, 1880, the plaintiff filed his reply, and court being in session, he, on the same day, filed a motion for a continuance supported by affidavits. On the morning of the seventeenth, the motion was overruled and the plaintiff required to go to trial at once. A verdict was rendered in favor of the defendants, upon which judgment was rendered dismissing the action.

The errors assigned in this court are substantially, that the court erred in overruling the motion for a continuance, and in its instructions to the jury. The affidavits in question state the testimony which the plaintiff expects the absent witness to give, and states facts from which it appears that such testimony is material, and could not be procured at that term of the court. The affidavits come within the rules heretofore adopted by this court and were sufficient. *Jameson v. Butler*, 1 Neb., 118. *State v. Thatch*, 5 Id., 97. *Williams v. The State*, 6 Id., 334.

In the case last cited (page 338), the court say: "If the affidavits in support of the motion in this case were such as to show that the ends of justice required a continuance to enable the accused to obtain material tes-

timony known to exist, we should feel bound to reverse the judgment on this ground alone."

It is said that an application for a continuance is addressed to the sound discretion of the court, and that its action thereon cannot be reviewed. But this is stating the rule too broadly. The object of the law is to administer justice, and where it clearly appears from all the facts and circumstances in the case that there has been an abuse of discretion operating to the prejudice of the party in the final determination of the case, the court, in a proper case, will grant a new trial. If it were not so, a party might be entirely defeated in his cause of action or defense for the lack of material testimony, which a continuance would enable him to procure. However desirable it may be to have business in court disposed of rapidly, it is of much greater importance that justice be administered, and that the court do not become the instrument for depriving a party of his rights. In the case at bar a number of continuances had already been had, apparently because the case was not at issue, and this circumstance doubtless influenced the court in overruling the motion. But in our opinion sufficient is shown to entitle the plaintiff to a continuance, and that the court erred in overruling the motion.

The court gave the following instruction to the jury: "Gentlemen of the jury, the plaintiff having offered no evidence, you will find for the defendants." Under the issue made by the pleadings it devolved on the defendant to show that the goods levied upon belonged to E. W. Grinnell, and as no proof was offered in the case, the instruction was clearly erroneous. The judgment of the district court is reversed and the case remanded for a new trial.

JUDGMENT ACCORDINGLY.

COBB, J., did not sit in the case.

Hardy v. Miller.

ALBERT HARDY AND OTHERS, PLAINTIFFS IN ERROR, V.
ELI MILLER, DEFENDANT IN ERROR.

1. **Mechanic's Lien.** In an action to enforce a mechanic's lien the relief sought by enforcing the lien does not constitute a separate cause of action.
2. **Pleading: DEMURRER: PARTIES.** A demurrer for defect of parties defendant will not lie unless it appears on the face of the pleading demurred to that necessary parties defendant are wanting.
3. **—: DEMURRER: MISJOINDER.** A demurrer for misjoinder of causes of action will lie only where the joinder itself is forbidden, such as uniting a cause of action in tort with one arising upon contract.
4. **Judgment: DEFAULT.** The authority to render judgment by default follows from the failure to answer within the time limited by law, and it is sufficient *prima facie* if it appear in the judgment that the defendant has failed to answer or demur.
5. **Attorney Fees.** There is no authority to allow attorney fees in actions founded on instruments executed since June 1, 1879.

ERROR to the district court of Gage county. Tried below before WEAVER, J.

W. H. Ashby, and *A. Hardy*, for Hardy, and *Colby & Hazlett*, for Emery, plaintiffs in error.

Sabin & Smith, for defendant in error.

MAXWELL, CH. J.

This is an action to enforce a mechanic's lien. The petition alleges in substance that on the 8th day of October, 1879, the plaintiff, Eli Miller, entered into a contract with Albert Hardy to build an addition to his dwelling house situated on lot 12, in block 61, in the city of Beatrice; that said contract was entered into with the full knowledge and consent of Mary Hardy, and that Albert and Mary Hardy were the owners of

11	395
16	398
17	494
23	709
11	395
26	430
11	395
31	492
11	395
36	510
11	395
40	724
11	395
57	203

Hardy v. Miller.

the premises in question. The petition also alleges the completion of the contract, the non-payment of the amount due, the steps necessary to obtain a mechanic's lien, that Emery claims an interest in the premises and asks judgment for the sum of \$115.00 and interest, and that the said premises may be sold to satisfy said claim. To this petition Hardy and wife filed separate motions to require the plaintiff to separately state and number his causes of action. These motions were overruled, in which it is claimed the court erred. The motions were properly overruled. There is but one cause of action set forth in the petition. The allegations as to the steps taken to obtain a mechanic's lien do not constitute a separate cause of action, but merely show the right of the plaintiff to have the property in controversy subjected to the payment of his judgment. These facts merely affect the relief to be obtained and not the right to recover a judgment. If, however, a motion had been filed requiring the plaintiff to state the time of the commencement and completion of his labor under the contract it should have been sustained, as the petition is indefinite in that regard.

Upon the motions being overruled, Hardy and wife filed separate demurrers to the petition upon the ground: *First*, that there is a defect of parties defendant. *Second*, that there is a misjoinder of causes of action. *Third*, that the petition does not state a cause of action. The demurrers were overruled, which is now assigned for error.

A demurrer for defect of parties defendant will lie only where it appears on the face of the petition that necessary parties defendant are wanting. *Neil v. Board of Trustees*, 31 Ohio State, 15. As there is no defect of parties apparent on the face of the petition, the demurrers on that ground were properly overruled.

Hardy v. Miller.

The second ground of objection, that there is a misjoinder of causes of action, will lie only where the joinder itself is forbidden, such as uniting a cause of action in tort with one arising on contract, and has no reference whatever to the *manner* in which causes are joined. Bliss on Code Pl., sec. 412, and authorities cited in note 1. As there is no misjoinder, the demurrers upon that ground were properly overruled.

The third ground of objection, that the petition does not state a cause of action is untenable. The statement of facts is not as definite as could be desired, but the remedy in such case is by motion and not demurrer.

Certain affidavits are filed stating that no argument was permitted in the court below on the demurrers, that in fact the cause was submitted without the knowledge of Hardy or his attorneys. But it does not appear that he has been prejudiced thereby in any manner, and it is very clear that the ruling on the demurrer is correct.

Upon the overruling of the demurrers a judgment was rendered in favor of Miller for the sum of \$122.25 and costs, and it is claimed that no default was taken against Hardy and wife before entering the same. That portion of the judgment is as follows: "Now on this 25th day of October, A.D. 1880, it being the tenth day of the term, this cause came on for hearing on the petition, the answer, and cross petition of the defendant, C. N. Emery, and the defendants, Albert Hardy and Mary Hardy, making default of answer at 4:30 P.M., and the evidence, and was submitted to the court, on consideration whereof," etc.

Section 134 of the code provides that "every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer not controverted in the reply, shall for the purposes of the action be taken as true," etc.

Hardy v. Miller.

Section 432 provides that: "If the taking of an account, or the proof of a fact, or the assessment of damages, be necessary to enable the court to pronounce judgment upon a failure to answer, or after a decision of an issue of law, the court may, with the assent of the party not in default, take the account, hear the proof, or assess the damages, or may with the like assent, refer the same to a referee; master, or commissioner, or may direct the same to be ascertained or assessed by a jury. . If a jury be ordered it shall be on or after the day on which the action is set for trial."

A default is an admission of the truth of the facts stated in the petition. *McKenzie v. Perrill*, 15 Ohio State, 162. *Deroin v. Jennings*, 4 Neb., 101.

The finding of the court that Hardy and wife made "default of answer" is one of fact. No judgment can lawfully be rendered by default until the time for filing an answer has elapsed, and the authority of the court to render such judgment follows from the failure of the defendant to answer, and not from the particular manner in which the default entered. The essential fact is the failure to answer, and where this appears in a judgment it is sufficient *prima facie* to authorize the action of the court, and its proper action in taking the default will be presumed.

In the case of *Smith v. Silvis*, 8 Neb., 167, the judgment did not show that Smith, one of the defendants, was in default. It was as follows: "And now on this day this cause came on to be heard before the court upon the pleadings and proof in said cause contained, and the court after hearing the evidence doth find that there is due the plaintiff," etc. This was held insufficient. But in the case at bar the judgment shows that Hardy and wife had failed to answer, and this is sufficient *prima facie* to sustain the judgment. The court found that there was due from Hardy and wife to the

 Boyce v. Berger.

defendant, C. N. Emery, upon the note and mortgage set up in his cross-petition, the sum of \$218.26, and found that the same was subject to the mechanic's lien of Miller. The court also allowed an attorney's fee of \$21.80 for foreclosing the mortgage. There is no bill of exceptions, and we are therefore unable to review the question of the priority of liens. The allowance of attorney's fees seems to be unauthorized. The note is dated November 17, 1879, and the act repealing the act for the allowance of attorney's fees took effect June 1, 1879. There was therefore no authority to include attorney fees in the claim. *Dow v. Updike*, 7 N. W. Reporter, 857, *ante* page 97. The defendant Emery has leave to remit the attorney fees from the decree within thirty days from this date, and upon condition that such remittitur is made the judgment of the court below is affirmed. In case the defendant Emery fails to enter such remittance as above provided, the decree of foreclosure of the mortgage is reversed and the cross petition remanded for further proceedings.

JUDGMENT ACCORDINGLY.

CAROLINE G. BOYCE, PLAINTIFF IN ERROR, V. PETER
BERGER, DEFENDANT IN ERROR.

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41	435

One Boyce purchased certain lands at tax sale, and afterwards received tax deeds therefor; B. purchased the lands at sheriff's sale, and afterwards promised orally to pay an agent of Boyce the principal and ten per cent interest for the amount paid at the tax sale. Boyce surrendered nothing, and nothing was done under the agreement. *Held*, That it could not be enforced.

ERROR to the district court for Nemaha county.
Tried below before POUND, J.

Boyce v. Berger.

J. H. Broady and T. L. Schick, for plaintiff in error. A past consideration or a moral obligation is a sufficient consideration for a promise. 1 Pars. on Cont., 471-2 and note d. *Gleason v. Dyke*, 22 Pick., 393. Payment of taxes was a moral obligation resting on defendant. Payment by plaintiff was for his benefit. *Pettit v. Black*, 8 Neb., 62. *Iler v. Colson*, 8 Neb., 331. *Wood v. Helmer*, 10 Neb., 65. See also *Wells v. Mann*, 45 N. Y., 327. *Hudson v. Busby*, 48 Mo., 35. *Pittson v. Noyes*, 48 N. H., 294.

Stevenson & Murfin, for defendant in error. The transaction is within the statute of frauds. *Rose v. O'Linn*, 10 Neb., 367, and cases cited. *Parker v. Crane*, 6 Wend., 648. See also *Lewis v. Simons*, 1 Handy, 82. *Updike v. Titus*, 13 N. J. Equity, 151. *Tooley v. Windham*, Cro. Eliz., 206. *Mills v. Wyman*, 3 Pick., 207.

MAXWELL, CH. J.

This is an action to recover upon an alleged verbal promise to repay money paid for lands purchased at tax sales. The plaintiff alleges in her petition that in the year 1875 she purchased at private tax sale certain real estate in Nemaha county for the taxes of 1871, 1872, and 1873, and also paid the taxes due on said lands for the year 1874, and that said lands were not redeemed, and that after the expiration of two years from the date of said sale she received a tax deed therefor in due form, which was afterwards recorded. That on the 3d day of June, 1874, the defendant received a deed of said premises from the sheriff of said county, and thereby became the owner of said premises subject to all taxes and liens thereon. That by reason of irregularities in the assessment and proceedings there was doubt as to the validity of her tax deeds and the rights of the plaintiff, and on the 6th day of

Boyce v. Berger.

May, 1878, the plaintiff and defendant mutually agreed to compromise said claims, the defendant verbally promising to pay her the amount expended in purchasing said land and in payment of taxes thereon, together with ten per cent interest, etc. This agreement is denied in the answer. There are other allegations in the petition which we do not deem it necessary to notice, as the plaintiff must recover, if at all, under the issue upon the promise above set forth. On the trial of the cause the court found "that defendant promised the plaintiff's agent to pay plaintiff the amount which plaintiff has paid out for taxes on the land mentioned in the petition, but that said taxes were void and not a lien on said land, and that the defendant was not personally liable to pay said taxes, nor were they a charge on said land at the time of said promises, and that the defendant's promises were without consideration, and find as a conclusion of law that the defendant is not liable on said promises," etc.

The prevention of litigation is a sufficient consideration to support a mutual compromise of claims, and a court will not inquire into the relative value of the claims for the purpose of setting the same aside where no undue means have been used to obtain in settlement. 1 Parsons on Contr. (5th ed.), 438-9, and cases cited. 1 Smith's L. C. (6th Am. ed.), 552.

A parol agreement of compromise which has been executed is of equal effect with one in writing. But it will scarcely be contended that a mere verbal agreement to compromise, not founded on any consideration or under which no right has been surrendered, possesses such validity. The waiver or abandonment of one right may be a sufficient foundation for the acquisition of another. But what right has the plaintiff abandoned in this case? There is not a particle of testimony tending to show that she has assigned or offered

Boyce v. Berger.

to assign her right, or convey her title derived from the tax deeds and payment of taxes, to the defendant. If the plaintiff, in pursuance of the alleged compromise, had conveyed her interest in the premises to the defendant, and he had accepted such conveyance, he would be compelled to pay the consideration agreed upon. And the contract being fairly made in settlement of a doubtful claim valid on its face, the court would not enquire whether any, or what title, passed by the conveyance. But the deeds being valid upon their face, thereby cast a cloud upon the defendant's title, and it is not sufficient merely to introduce testimony tending to show their invalidity. The plaintiff must show a performance upon her part of the terms of the alleged compromise, and this she has failed to do. She still retains her tax deeds and whatever rights she may have obtained under them, and also her claims for taxes paid in 1874. Whether the defendant can defeat such tax deeds by refusing to pay his taxes after he obtained a sheriff's deed for the land, and apparently had possession thereof, and permitting the land to be sold and obtaining tax deeds subsequent to the plaintiff, is a question not before the court. The finding of the court that the plaintiff's tax deeds are void, is entirely unauthorized by the pleadings. A judgment is conclusive only as to the matters directly in issue, and is not evidence of any matter which came collaterally in question. The question at issue is the existence of the compromise, not the validity of the tax deeds; but as such finding might operate to the prejudice of the plaintiff in an action under her deeds, it is set aside. As in our opinion the plaintiff has failed to establish the essential facts to entitle her to recover, the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. PHILIP MYERS, v.
THE COMMISSIONERS OF RICHARDSON COUNTY.

1. **County Commissioners: REDEMPTION FROM TAX SALE.**
County commissioners have no control over moneys collected by the county treasurer on redemption of lands from tax sale. Such funds are required to be held by the treasurer "subject to the order of the purchaser, his agent, or attorney."
2. ———. And when money is wrongfully exacted in the nominal redemption of lands, where no sale was in fact made, to the extent of the taxes and interest actually due, it is a payment; beyond this it is an unauthorized exaction, for which the treasurer but not the county is liable.

ORIGINAL application for mandamus.

C. Gillespie and George P. Uhl, for the relator.

W. S. Stretch, for respondent.

LAKE, J.

The money, for which it is sought to compel the respondents to draw their order upon the county treasurer, was paid by the relator under the erroneous belief that it was necessary in order to redeem his land from a tax sale. It seems that the books of the treasurer's office showed a formal sale of the land to one Miles, who, however, repudiated it, and it is now conceded that no sale was in fact made, and that the treasurer was wrong in exacting the payment.

But the county commissioners have no control over moneys thus collected by the treasurer. In case of an actual sale for taxes, the money paid on redemption is required to be held by the treasurer, "subject to the order of the purchaser, his agent, or attorney." Sec. 64, Gen. Stat., 922. And it appears from the facts of this case that of the money so paid by the relator, all

over and above the amount of taxes and interest actually due, is held and designated by the treasurer as "the Miles redemption fund," so termed from the name of the pretended purchaser. This nominal redemption, to the extent of the taxes and penalty due to the public, was in effect but a mere payment; beyond this it was an unauthorized exaction, for which the treasurer rendered himself liable to the relator. Doubtless the money demanded ought to be paid over, but there is no warrant of law for the commissioners to draw an order for that purpose. It is a matter which concerns only the relator and the officer by whom he has been wronged and his sureties. To them he must look for redress; he has no valid claim against the county.

WRIT DENIED.

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SQUIRE BLAZIER, PLAINTIFF IN ERROR, V. JOHN D. JOHNSON AND PIER BENSON, DEFENDANTS IN ERROR.

1. **Action to Recover Real Property:** **EQUITABLE DEFENSE** to. In an action by the holder of the title in fee for the recovery of real property, the defendant may interpose an equitable defense. But to avail him his equity must be superior to that of the plaintiff.
2. ———: ———. The plaintiffs purchased, paid for, and obtained from the state a deed in fee simple to two lots in Lincoln. The defendant claimed that under the law regulating the disposal of these lots he himself was entitled to a conveyance, on paying their appraised value, which was much less than the plaintiffs had paid. *Held*, 1. That a tender by him to the state of the appraised value, after the sale and conveyance to the plaintiffs, was unavailing. 2. That in asserting his equity, if he had it, he should have made and proved a tender to the plaintiffs of at least that amount, together with interest thereon from the time of their purchase, under the rule that he who seeks equity must do equity.

Blazier v. Johnson.

3. **Statute of Frauds:** SALE OF INTEREST IN LAND. As between the parties to it, and their privies, a contract for the sale of land, or of any interest therein, need not be either witnessed or acknowledged to be effective.
4. **Statute of Limitations.** As against the state, the rule of the English common law expressed by the maxim, *nullum tempus occurrit regi*, obtains, and the statute does not run.

ERROR to the district court for Lancaster county.
Tried below before POUND, J.

James E. Philpott and James L. Caldwell, for plaintiff in error. Evidence shows Blazier made a good tender. Refusal to accept cannot prejudice him. *Lytle v. State of Arkansas*, 9 How., 314. Patent to Benson passed no title as against possession and claim of Blazier. *Stark v. Starrs*, 6 Wall., 402. The right granted under the act of 1869 is analogous to a homestead right and is not assignable. *Dawson v. Merrille*, 2 Neb., 118. Fraud may be shown. *Franklin v. Kelley*, 2 Neb., 79. 1 Greenleaf Ev., sec. 284. *Huston v. Walker*, 47 Cal., 484. Patent for land reserved from sale is void. *Morton v. Nebraska*, 21 Wall., 660. The action is barred. *Yetzel v. Thoman*, 17 Ohio State, 182. *Horbach v. Miller*, 4 Neb., 46. *Smilie v. Biffle*, 2 Penn. State, 52.

A. G. Scott and J. R. Webster, for defendants in error. The action is not barred. *Morton v. Green*, 2 Neb., 451. *Lessee of Dresback v. McArthur*, 7 Ohio, 146. *Duke v. Thomson*, 16 Id., 34. Equity would require not merely a tender of the sum paid June 3, 1869, by defendants in error, but interest to the time of tender and taxes paid. *Stalnaker v. Morrison*, 6 Neb., 363. *Pettit v. Black*, 8 Neb., 52. Blazier tenders nothing, and has no equity. Patent is paramount evidence of title and will prevail, except an older title of the same character be proven. *Bagnell v. Broderick*, 13 Pet.,

Blazier v. Johnson.

436, 449-51. *U. S. v. Stone*, 2 Wall., 525, 532. *Shipley v. Cowan*, 91 U. S., 330, 338.

LAKE, J.

This was an action for the recovery of two lots in the city of Lincoln. In his answer the plaintiff in error conceded that the legal title was in the defendants in error, but pleaded in bar of their claim, *first*, the statute of limitations, and, *second*, that he himself was well entitled to the lots by virtue of his occupancy and improvement thereof under the act of the legislature of February 15th, 1869: "For the relief of persons who have improvements upon state lots in the town of Lincoln." Laws 1869, 247. And in this behalf he avers that the state officers having the disposal of these lots, in disregard of his rights, fraudulently sold them to the defendants in error, who were purchasers with notice of his equities. This sale was made and the title passed from the state by deed to Pier Benson, one of the defendants in error, April 4th, 1870.

In ejectment this title from the state by deed in fee should of course prevail, unless overborne by the superior equity of the plaintiff in error. It is now settled law, and conceded to be so by the defendant's counsel, that a defendant in ejectment may interpose an equitable defense to defeat a recovery by the holder of the legal title. But to avail him, his equity must of course be superior to that of the holder of the fee. Has Blazier shown such equity in himself, or even made such a case by his proofs as would support a finding by a jury that he had? Most clearly not, as we think.

In addition to the fact of Blazier's settlement upon and improvement of these lots, of which there is no controversy, his answer sets forth that he tendered to the proper state officers the amount at which they had been valued under the act above referred to. But it

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will be noticed that the time of making this tender is not stated. In his testimony, however, he said, "it was the last of April or the first of May" that he made it, which was at least several days after the title had passed from the state by the conveyance to Benson. This tender, therefore, even if it were made, of which there is considerable doubt under the testimony, was a useless act, for the state had already received payment and had no title to convey.

In this condition of things respecting the lots, to assert his equity, if he had it, against the defendants in error, Blazier should have made and proved a tender to them of at least the appraised value of the lots, which the answer conceded the defendants in error had paid, together with interest on that amount from the time of payment. But he did not do this. He has made no offer to reimburse them for any portion of their expenditure of fifteen hundred dollars in paying for the lots of which he now seeks to deprive them by what he claims is a superior equity. In other words, he demands the judicial establishment of his ownership of the property as against those whom he admits have bought and paid for it, without the payment of a single dollar by himself. To accord him this, it seems to us, would require a total disregard of the common maxim, that one who seeks equity must be willing and ready to do equity. In this particular we find both the answer and the evidence adduced by the plaintiff in error to be decidedly wanting.

But there is still another equally potent objection to this claim of equity by the plaintiff in error. It is shown beyond all question, that prior to the time of the conveyance by the state to Benson, the plaintiff in error sold his entire interest in the lots to one Kahn, who in turn transferred it to the defendants, whereby they were enabled, on making the payment of fifteen

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hundred dollars, which amount the answer admits they paid, to procure from the state the conveyance of the legal title through a deed from the officers appointed to make it. It is now said that of this money only three hundred and fifty dollars found its way into the state treasury. This may be so, but it is a matter not involved in this controversy, and upon which we can express no opinion. At all events, whatever the truth may be concerning this part of the transactions respecting these lots, it cannot affect the rights of Johnson and Benson, who were doubtless purchasers in good faith. Even if Kahn, and certain state officials, or either of them, retained the residue, as is suggested, that should not be permitted to prejudice those not shown to have been parties to the fraud. It is a matter that does not concern the issues with which we are here dealing. Again, it is possible that Blazier was wronged in his dealing with Kahn, although it is not clear from the evidence before us that he was, but even if he were, it must be remembered that it was through this dealing—this sale of Blazier's interest in the lots—that the defendants in error were induced to make their purchase, and to part with their money.

The evidence shows that the assignment of Blazier's interest in the lots to Kahn was in writing. Counsel urged against it, however, that it was not witnessed and acknowledged, and therefore passed no title. It is true that such an instrument would not convey the fee, but this Blazier did not have to convey, it was then in the state. Being in writing and signed by him, it fully answered the requirements of the statute of frauds, and was effective to pass all the interest he then had. As between the parties to it, and their privies, a contract for the sale of land, or of any interest therein, need not be either witnessed or acknowledged to be effective.

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As to the plea of the statute of limitations, that, very clearly, was bad. This statute required an adverse occupancy of ten years duration, before the bringing of the action, to constitute a bar. It is clear that while the state owned the lots—although Blazier had taken possession—the statute did not run. As against the state the rule expressed in the English common law by the maxim, *nullum tempus occurrit regi*, obtains. And as before shown, according to the answer, which in this particular was sustained by the evidence, the state parted with the title April 4th, 1870, and the action was commenced in May, 1878, so that, at most, the statute could have run only a little over eight of the ten years required.

Being of opinion that no defense was shown either by the answer or the evidence as against the legal title held by the defendants in error, the judgment must be affirmed.

JUDGMENT AFFIRMED.

COBB, J., having been of counsel below, did not sit.

THOMAS J. WELLS, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: VERDICT: HORSE-STEALING.** The prisoner was indicted and convicted of the crime of horse-stealing. A motion was made to set aside the verdict and for a new trial, one of the grounds being the mistake of certain of the jurors, as shown by their affidavit, which was in substance that they supposed the offense to amount only to petit larceny if the value of the animal stolen were returned by them as being less than thirty-five dollars; that "they did not intend to convict the said defendant of a felony, but that they intended to convict him of petit larceny only," and that they "were of the opinion that the said defendant was not guilty of a greater crime than

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petit larceny." *Held*, that this mistake of the jurors furnished no ground for setting the verdict aside.

2. ———. In the crime of horse-stealing the distinction of grand and petit larceny, which exists in the theft of other species of personal property, is not known. The character of the crime is the same whether the value of the animal be five hundred or only twenty dollars.
3. ———: CHARGE TO JURY: INSANITY. It is not error for a court to refuse to instruct upon the matter of the prisoner's sanity, when there is no evidence tending to show that he is insane.
4. ———: EVIDENCE: CHATTEL MORTGAGE. To disprove the allegation of ownership of the horse, as alleged in the indictment, the prisoner offered in evidence a chattel mortgage, or bill of sale, of the animal to a third party, executed while he was the acknowledged owner, and which antedated the sale under which the alleged owners claimed. This was excluded on the ground of immateriality. *Held*, that the instrument was material, and its exclusion erroneous.

ERROR to the district court of Fillmore county. Tried there before WEAVER, J., upon an indictment against Wells for horse-stealing. Verdict of guilty and that value of horse stolen was \$21. Wells moved for a new trial, assigning as one ground of the same that the jury had rendered a verdict under a misapprehension of the legal effect of the same. This ground was supported by the joint affidavit of nine of the jury, who made oath that they did not believe Wells guilty of a felony, and did not and would not so find, and that a verdict so finding was not their verdict. This affidavit was made and filed immediately on the termination of the trial. The court overruled the motion and entered judgment on the verdict and sentenced the prisoner to six years confinement in the penitentiary.

James Laird and John Barsby, for plaintiff in error. The affidavit of the jurors was competent. *Moffatt v. Bowman*, 6 Gratt., 219. *United States v. Reid*, 12 How-

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ard, 361. *Norris v. State*, 3 Humphrey, 333. *Cochran v. State*, 7 Humphrey, 43. *Farrer v. State*, 2 Worden (Ohio), 54. Graham and Waterman on New Trials, 1433. *Packard v. United States*, 1 Green (Iowa), 255. *State v. Hascall*, 6 New Hampshire, 325. The chattel mortgage should been admitted in evidence. 2 Wharton Crim. Law, 1818. *Commonwealth v. Morse*, 24 Mass., 217. *Id. v. Manly*, 12 Pick., 173.

C. J. Dilworth, Attorney General, with *J. W. Eller*, for the State. Juror's affidavit not receivable to impeach their verdict. *Stanton v. The State*, 13 Ark., 317. *People v. Hartung*, 4 Park. Cr., 256. The mortgage, had it been introduced in evidence, would not have shown the title of the horse in Barsby. The title (proved by the state) to the horse was a legal title, and the mortgage being rejected was no prejudice to the rights of the prisoner. *Ward v. People*, 3 Hill (N. Y.), 396. *People v. Sprick*, 1 Parker Cr., 329. *People v. Bennett*, 36 N. Y., 117. *Owen v. State*, 6 Hump. (Tenn.), 330. *Hill v. State*, 1 Head (Tenn.), 454. *Langford v. State*, 8 Tex., 115. *State v. Bardison*, 75 N. C., 203. *Blackburn v. State*, 44 Tex., 450. *Cox v. State*, 43 Tex., 101. *State v. Pettis*, 63 Me., 124. *Mosley v. State*, 42 Tex., 78. *Petre v. State*, 35 N. J. L., 64. *State v. Mullen*, 30 Iowa, 203.

LAKE, J.

There was no error in refusing to set aside the verdict on the affidavit of the nine jurors of the panel that found it. They do not say that it fails to express their finding precisely upon the matter entrusted to their decision, viz., the larceny of the horse; but simply that the grade of the offense, and its punishment, are greater than they had supposed; so much so indeed,

that had they been advised of it, they would not have found him guilty.

With the punishment of the accused the jury had nothing to do. That was a matter exclusively within the province of the judge, within certain statutory bounds. Their duty was simply to pass upon the facts charged in the indictment, and whether the punishment to follow in case of conviction was in the penitentiary or only in the county jail, was a matter that could have no legitimate bearing upon the question of guilty or not guilty, which they were to answer. The rules of evidence and all the presumptions of law were the same, whether the punishment was more or less severe.

The purport of the affidavit is, that these jurors believed the prisoner stole the horse, but that they supposed the offense to amount only to petit larceny if the value of the animal stolen were returned by them as being less than thirty-five dollars, which they did without a particle of evidence to support them in it. Indeed, to use their own language, "they did not intend to convict the said Thomas J. Wells of a felony, but that they intended to convict him of petit larceny only," and that they "were of the opinion that the said defendant was not guilty of a greater crime than petit larceny." Their mistake, therefore, as before stated, was not in any act of their own—not in any expression of the verdict—but in their supposition that in horse-stealing the same distinction of grand and petit larceny exists as in the theft of other species of property. But no such distinction is known to our law, and the character of the crime is the same, whether the value of the animal be five hundred or only twenty dollars. No case has been cited, and we think none can be found in which a verdict has been set aside on such grounds.

The second error relied on is the refusal of the court to admit in evidence a chattel mortgage of the horse alleged to have been stolen, executed by the prisoner while he was the acknowledged owner, to one John Barsby. The indictment charged that the horse when stolen was the property of James W. Eller and Julius O. Chase. There was testimony introduced by the state which, uncontradicted, would justify the conclusion that this was true; but taking into consideration the evidence offered on behalf of the prisoner, this allegation of ownership, as to Chase, at least, was placed in some doubt as to its correctness. Eller and Chase both swore that the latter was half owner with the former; while Chase swore that his half interest was obtained by the surrender of a mortgage on the horse given him by Wells; while Wells for himself testified, in effect, that the surrender of this mortgage was not in consideration of Chase receiving an interest in the horse, but on account of certain collaterals and securities placed in his hands, and which he then had. That on surrendering the mortgage, Chase said "he had nothing to do with the horse," that "he had enough collaterals and other securities for the horse. He said he had a few dollars in it; but I think he said he would throw that off." This testimony of the prisoner, as to what Chase said to him, stands before us uncontradicted; and it at least tends to show that in September, 1880, when Wells took the horse, Chase had no interest in him whatever.

The tendency of the mortgage or bill of sale to Barsby, which was given in May, 1879, and antedated the somewhat questionable sale by Wells to Eller, tended to show ownership in the horse adverse to that charged in the indictment, and we think should have been submitted to the jury for that purpose, together with the other evidence bearing on that point. The question

of ownership was material, and all testimony tending to throw light upon it was certainly admissible.

There was no error in the refusal to charge upon the question of the prisoner's sanity. There was no evidence tending at all to show him not of sound mind at the time of the alleged offense, nor indeed at any other time. The refusal to instruct, when there is no evidence to which the instruction requested could possibly apply, is not error. Neither was it error for the judge merely to omit to instruct generally upon the law of the case. It is possible if a request to this effect had been made to the judge, that a refusal would have been erroneous. There are authorities that so hold; but as there was no request in this case, the question is not properly before us for decision.

For the error committed in the rejection of the chattel mortgage, the judgment is reversed and a new trial awarded.

REVERSED AND REMANDED.

JAMES R. JOHNSON, PLAINTIFF IN ERROR, V. WILLIAM C. GHOST, ADMINISTRATOR, DEFENDANT IN ERROR.

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1. **Practice: DEFENDANT IN ERROR: REVIEW OF ERRORS COMMITTED AGAINST HIM ON THE TRIAL IN THE ADMISSION OF EVIDENCE.** To entitle a defendant in error to a review in the supreme court of errors in the admission of evidence against his objection, it is not enough that he excepted to the overruling of his objection, but he should have moved for a new trial on that ground, and if still unsuccessful, have prosecuted a petition in error. The rule in this particular is the same, whether the party complaining of such errors be a plaintiff or a defendant.
2. **Advances of Money by a Parent to his Child: HOW REGARDED.** The legal inferences arising from advances of

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money by a parent to his child, when wholly unexplained by evidence, is, that they were by way of gift, and not by way of loan. And the force of this inference is not weakened by the fact of the son having given to his father a statement in the form of an account of the several sums so advanced to him.

ERROR to the district court for Dodge county, where the cause had been brought upon appeal from an order of the county court allowing the plaintiff an account amounting in the aggregate to \$2,134.50 against the estate of James C. Johnson, deceased. Upon a trial before Post, J., judgment was rendered in favor of plaintiff for the sum of \$156.55, and against him for the costs, to reverse which he brought the cause here upon a petition in error.

Marlow & Munger, for plaintiff in error.

W. C. Ghost and *C. Hollenbeck*,* for defendant in error.

LAKE, J.

The petition in error presents but a single question for our determination, viz.: Whether the finding of the court is supported by the evidence. The complaint is that the recovery was for an amount much less than the plaintiff was entitled to. This question must be answered under the well established rule of this court, not to interfere with decisions of questions of fact unless it is very clear that injustice has been done.

Referring to the judgment entry, we find that as to all of the disputed items of the plaintiff's demand, the finding was in favor of the defendant, the recovery being limited to "the sum of \$156.55, due the said plaintiff under the pleadings in this action, the allowance of the same not being resisted by the defendant." By this it is shown that as to the disputed items the court regarded the copy of the alleged acknowledg-

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ment of indebtedness by the deceased, admitted in evidence, as insufficient to remove the bar of the statute of limitations which had run against them, and was one of the defenses made by the answer.

The defendant, in argument, contends that this copy was erroneously admitted in evidence, and therefore ought now to be disregarded. It is true that on the trial he did object to its introduction, and possibly for a sufficient reason, but that was not enough to entitle him to a review of the action of the court in admitting the paper against his objection. He should have moved for a new trial on that ground, and, if still dissatisfied with the ruling, prosecuted a petition in error to this court. Having failed to take these steps, he is deemed to have waived the error, if one were committed, and cannot now be heard in complaint. The rule in these particulars is the same whether the party complaining of errors be a plaintiff or a defendant. We must therefore regard this copy as properly in evidence, and give to it all the weight to which it seems to be entitled, in other words, treat it as if it were the original statement made by the deceased.

This statement shown to have been made in February, 1879, was as follows:

J. C. Johnson, Debtor to J. R. Johnson:

March 5th, 1869, To cash	\$300 00
May 3d, 1869, To cash	199 50
May 26th, 1869, To cash	200 00
June 28th, 1869, To cash	100 00
April 23, 1870, to cash.....	25 00
June 20, 1870, to cash.....	100 00
1874, to cash.....	50 00
1875, to cash.....	25 00
1876, to cash.....	30 00
Jan. 1879, to cash.....	75 00
Feb. 17, 1879, to cash.....	30 00

That these several sums of money were advanced by the plaintiff as indicated by this statement there is probably no doubt, for it is shown that the greater portion was in the shape of bank drafts purchased by him, and made payable to the order of his son. Indeed, the receipt of the money by the deceased is not denied by the answer, but it is alleged that all of the several items, except the last four, "were gifts from the said plaintiff to his said son, the said decedent, and so understood and acted upon by both of said parties."

Owing to the remarkable lack of evidence we have nothing before us to show the understanding of the parties respecting these advances at the time they were made. If it were expected by the father, or understood by the son that they were to be regarded as ordinary loans to be repaid at a fixed time, or on demand, certainly there is nothing in the record to indicate it, and we are therefore left to the legal inference arising from such advances by a parent to a child, which is as stated by Bailey, J., in *Hick v. Keats*, 4 B. & C., 71, that they were by way of gift and not by way of loan. And the force of this inference is not in our opinion at all weakened by the fact of the son having given the statement imputed to him of the moneys he had so received. In the first place it does not appear that the father required such statement to be made, and even if he did, it is not at all probable that it was with the view of exacting repayment, but rather to furnish a memorandum that might be of use in the subsequent division of his estate among his heirs. This, very likely, was the view taken by the court below, and we think it justifiable at least.

But even if these advances could be regarded as actual loans under the provisions of section eleven of the code of civil procedure, no action could be maintained

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upon them after the expiration of four years from the time they were severally made, unless the statutory bar were removed as provided in section twenty-two, which declares that: "In any cause founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise."

With a due observance of the relation which these parties bore to each other, we do not think it would be reasonable to hold that the statement made by the son was sufficient to answer the requirement of this statute, and operate to remove the bar. It would surely be giving to it too much importance to say that it was an acknowledgment of a then "existing" legal liability for the moneys so received. By the most liberal construction it imports no such thing. It is at best but a statement that at the dates given he became debtor to his father for the several amounts mentioned, not that he was still such debtor, nor that, at the time of giving it, he was under a legal obligation to make payment thereof.

In *Wachter v. Albee*, 80 Ill., 47, it is said that: "Where a party permits a debt to run, making no effort to collect it until the statute of limitations can be pleaded in bar of the action, he is in no position to call upon the court to aid him upon slight proof; on the contrary, the evidence ought to be clear and satisfactory to overcome the bar of the statute." We see no reason for disturbing the judgment of the court below, and it is in all things affirmed.

JUDGMENT AFFIRMED.

**WILLIAM E. DILLON, PLAINTIFF IN ERROR, V. GILBERT
B. SCOFIELD AND OTHERS, DEFENDANTS IN ERROR.**

Action on Replevin Bond: SUBROGATION. G. B. S. sued H. B. in replevin. H. & K. became sureties on the replevin bond. Judgment for defendant. G. B. S. sued out a writ of error to the supreme court, and gave a supersedeas bond with W. E. D. as surety. The judgment was affirmed in the supreme court. Suit was then commenced on the supersedeas bond, and judgment obtained against G. B. S. and W. E. D. G. B. S. being insolvent, the money was collected from W. E. D., who brings this suit against G. B. S., H., and K., and prays to be subrogated, etc. In his petition he alleges that "the said defendant G. B. S., with the knowledge, consent, and concurrence of the other defendants herein, M. M. H. and C. K., removed the said cause to the supreme court by petition in error, and in order to stay proceedings * * * this plaintiff, as surety for the said defendants G. B. S., M. M. H., and C. K., signed and executed a supersedeas bond." The district court sustained a general demurrer to the petition. *Held*, to be error, and reversed.

ERROR to the district court for Otoe county. Heard below before POUND, J.

J. L. Mitchell, for plaintiff in error. The relation of a replevin bond given under our statute to a subsequent error or appeal bond given in the same case is that of principal to a supplemental obligation; and therefore the replevin bond must pay the debt to the relief of the appeal bond. *Hartwell v. Smith*, 15 Ohio St., 200. *Parsons v. Briddock*, 2 Vernon, 608. *Cowan v. Duncan*, 1 Meigs, 470. *Howe v. Frasier*, 2 Rob., La., 424. *Sayler v. Ross*, 15 Ind., 180. *Sayler v. State*, 5 Ind., 202. Story's Equity, sec. 498. *Craythorne v. Sveinburne*, 14 Vesey, 159, 165, and 199. 1 Lead. Cas. Eq., H. & W.'s notes, 116 and 158. But suppose we are wrong in this theory of the case, and the defendants Hamlin and Keegan are not principals, we then

insist on the right of subrogation or substitution. Dillon having paid this debt is entitled to stand in the place of the creditor, and to have all the rights which the creditor had for the purpose of reimbursement. *Mathews v. Akin*, 1 N. Y., 595. *Lewis v. Palmer*, 28 N. Y., 271. *Armistage v. Pulver*, 37 N. Y., 494. *Hartwell v. Smith*, 15 Ohio St., 200. See also *Keokuk v. Love*, 31 Iowa, 119.

John C. Watson and H. R. Wodehouse, for defendants in error, cited *Winston v. Rives*, 4 Stew. & P. (Ala.), 269. *Brooks v. Shepherd*, 4 Bibb, 572. *Smith v. Bing*, 3 Ohio, 38-41. *Chaffin v. Campbell*, 4 Sneed, 184. *Carmon v. Duncan*, Meigs, 470. *Smith's Exrs. v. Anderson*, 18 Md., 520. *Kellar v. Williams*, 10 Bush., 216. *Dunlap v. Foster*, 7 Ala., 734. *Hinckley v. Kreitz et al.*, 58 N. Y., 583. *Wells v. Miller*, 66 Id., 255.

COBB, J.

This case turns upon a single point. The plaintiff alleges in his petition that the defendant Scofield commenced an action in the district court against Henry Brown, administrator, etc., to recover the possession of one piano and piano stool; that in the course of such action, such proceedings were had that * * * the said defendants, Scofield, Hamlin, and Keegan, made and executed to the said Henry Brown, administrator, etc., their written undertaking, a copy of which is set out in said petition, and is the usual undertaking in replevin, in the penal sum of six hundred and two dollars, double the alleged value of the piano and stool; "that the said Gilbert B. Scofield, plaintiff, shall duly prosecute his action aforesaid, and pay all the costs and damages which may be awarded against him, and return the property to the defendant in case judgment

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for the return of such property be rendered against him;" that the goods and chattels referred to in the said undertaking were delivered to the said Scofield pursuant to said undertaking, etc.; that such further proceedings were afterwards had in said action that, at the March term, 1877, of the said court a verdict in the said court was rendered against said Gilbert B. Scofield, wherein the right of possession of the said goods and chattels was found to be in the said Henry Brown, administrator, etc., and the value of said possession was found in and by said verdict to be \$301, and judgment was accordingly rendered by said court against the said Gilbert B. Scofield and in favor of the said Henry Brown, administrator, etc., for the return of the said property, or in default thereof for the said sum of three hundred and one dollars damages, and the further sum of one hundred and four dollars, the costs and charges in the said suit. Whereupon the said defendant Scofield, with the knowledge, consent, and concurrence of the other defendants herein, M. M. Hamlin and Charles Keegan, removed the said cause to the supreme court of the state by petition in error, and in order to stay proceedings against the said Scofield and the other said defendants upon said judgment until said petition in error could be presented to and considered and determined by the said supreme court, the said plaintiff Dillon, with others, and as security for the said defendants, G. B. Scofield, M. M. Hamlin, and Chas. Keegan, signed and executed a bond," which bond is set out in full.

The plaintiff in his said petition further alleges that the said judgment was affirmed by the supreme court, and a mandate thereupon issued to the district court of Otoe county to enforce the collection thereof. That execution issued thereon against the said Scofield, and was returned *nulla bona*. That thereupon suit was

brought against the plaintiff by the said Henry Brown, administrator, etc., upon the said supersedeas bond, and he, the said plaintiff, had been compelled to pay the amount of said judgment and costs, etc.

For the purposes of this suit at its present stage, by virtue of the demurrer of the defendants, it stands admitted that it was with the knowledge, consent, and concurrence of the defendants that the said replevin suit was carried to the supreme court on error. Not only so, but it also stands admitted that the plaintiff signed and executed the said supersedeas bond as security for the defendants Hamlin and Keegan, as well as for Scofield.

In the case of *Hartwell v. Smith*, 15 Ohio St., 200, cited by counsel for the plaintiff, the supreme court of Ohio say: "In regard to this question of superiority of equities, which is liable to arise in the case of prior and subsequent bonds executed by different sureties for distinct purposes, and both constituting securities in the hands of the creditors for the same debt, it is well settled that if the interposition of the second surety is for the benefit of the principal alone, without the sanction or assent of the first surety, who may be prejudiced thereby, as when the effect of the second bond is to prevent the enforcement of present payment from the principal, and thus to prolong the responsibility of the first surety; in such a case the equity of the first surety is superior, and he is entitled to be subrogated to the rights of the creditor as against the second.

* * * But the rule is otherwise when the surety in the second becomes bound for a purpose in which both the principal and the prior surety concur, in which they both have an interest, and where the assent of the prior surety is expressly given, or is clearly inferred from the circumstances of the case. In such a case the last surety has a right to look for his indem-

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nity, not only to his principal but to such fixed securities as had been given to the creditor when his engagement was entered into, and on the faith of which he may be presumed to have incurred his obligation."

I understand the word *concurrence*, or *to concur*, to mean something more than a mere acquiescence or silent submission. But whatever it means, it is within the above authority, as well as the reason of the case, that if the plaintiff signed and executed the supersedeas bond with the *concurrence* of the sureties to the replevin bond, or if he signed the supersedeas bond in point of fact as the surety of all the defendants, Hamlin and Keegan, as well as Scofield, he is entitled to be subrogated to the rights of the defendant in the original replevin suit. And he having presented an issue on those points in his petition, is entitled to an answer from the defendants.

I therefore conclude that the court erred in sustaining the demurrer, and such judgment is reversed and the cause remanded for further proceedings, in accordance with law.

REVERSED AND REMANDED.

FREDERICK BACHLE, PLAINTIFF IN ERROR, v. H. P. WEBB
AND OTHERS, DEFENDANTS IN ERROR.

Attachment: JUDICIAL SALE. F. B. sued out an attachment against W. B. & W., alleging as ground for the attachment that the said W. B. & W. "had assigned, removed, or disposed of their property, or a part thereof, with the intent to defraud their creditors." Certain real estate was attached, judgment in the action, execution and sale of real estate, which was bid off by W. L., a volunteer. At the next term the application for confirmation was resisted by W. B. & W., and W. L. on the ground that as the defendants had conveyed all title to the real

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estate before the levy of the attachment, the purchaser W. L. got no consideration for his bid. No showing of misconduct, misrepresentation, or fraud, on the part of the officer, the plaintiff, or any other person. Order setting the sale aside. *Held*, error, and reversed.

ERROR to the district court for Gage county. Trial below before WEAVER, J.

Colby & Hazlett, for plaintiff in error. Parties cannot object to confirmation of sale on ground that title of the property sold is defective. *Phillips v. Dawley*, 1 Neb., 322. *Buckingham v. Granville Society*, 2 Ohio, 361. Question of title cannot be litigated on the confirmation of the sale. *Herman on Executions*, 433. *Terrell v. Anchauer*, 14 Ohio, 80. *Bolgiano v. Cook*, 19 Md., 375. *Todd v. Dowd's Heirs*, 1 M etc., (Ky.), 281. *Voorhees v. Bank*, 10 Peters, 469. *McCleary v. Faber*, 6 Penn. St., 476. *Paine v. Sprailly*, 5 Kan., 525.

Brown, Marshall & Brown, for defendants in error. Under the statute, sales upon execution or order of sale, as well as those made in pursuance of decrees, must be approved and confirmed by the court, and the deed to the purchaser at the sale must be ordered by the court. A deed made without such approval and order is not valid, and conveys no title to the purchaser. *State B'k of Nebraska v. Green*, 8 Neb. 299. *Lessee of Curtis v. Norton*, 1 Ohio, 278. A purchaser at a judicial sale will not be required to complete the sale when the title is defective. Although the rule "*caveat emptor*" applies in the absence of fraud, after the sale has been confirmed and the deed delivered, yet if the title is defective, the purchaser will not be compelled to complete the sale if he makes objection thereto *before confirmation*. *Rorer on Judicial Sales* p. 66, Sec. 155. *Ormsby v. Terry*, 6 Bush (Ky.), 553. *Hunting v. Walter*,

83 Md., 60. *Mechanics Savinys Ass'n v. O'Conner*, 29 Ohio State, 651. *Ritter v. Henshaw*, 7 Iowa, 97. *Ham-smith v. Espy*, 19 Iowa, 444.

COBB, J.

The plaintiff in error sued out an attachment against the property of the defendants in error, and levied on the city lot in question, as the property of one of the defendants. The ground for the attachment was that the defendants, or some of them, had fraudulently conveyed their property, or some portion of it, with intent to defraud their creditors. Judgment was rendered for the plaintiff, an order of sale issued, the lot advertised, offered for sale, and bid off by one William Lamb. At the ensuing term of said district court the said plaintiff having applied for an order confirming the said sale, the said Lamb, together with the defendants in the said original proceeding, appeared and resisted such order, and made the following points:

First. That none of the defendants named in the attachment or order of sale had any right, title, or interest whatever in the premises sold at the time the attachment was issued and levied, nor since that time, nor when the judgment was rendered, nor since that time, and that the sale, and a sheriff's deed made in pursuance thereof, would convey no title nor interest whatever in the premises to the purchaser.

Second. That long before the order of attachment issued in this cause was levied upon the premises sold, the sale of which is asked to be confirmed, all of the defendants who ever had any interest in said premises had conveyed the same by deed to third parties.

Third. The same idea is expressed in different words.

Fourth. That the certificate of the county clerk of Gage county, made and delivered by him to the

sheriff as required by law, did not show all the incumbrances on said premises; but said certificate wholly failed to show that all of the defendants had parted with their title to said premises before the levying of the order of attachment issued in this cause, etc.

Whether there was any statute positively requiring the confirmation of judicial sales or not, it has always been the practice, as well in the several American states as in England, where sales of real estate were made by order or decree of a court of equity. A court of equity having once obtained jurisdiction of the subject-matter as well as of the parties, would continue it and assert it for all purposes necessary to a complete settlement of the litigation upon principles of equity and good conscience. When in the course of such litigation or settlement it became proper to sell real estate under the direction of a master, commissioner, or trustee—virtually under the direction of the court—every bidder at such sale was held to submit himself for the purposes of such sale and purchase to the jurisdiction of the court, and every question arising between different bidders, or between the court and any bidder, would be settled by the court on the same principles, and this care and oversight of the court was often extended to the compelling of a purchaser to comply with the terms of his bid, and on the other hand to relieve him therefrom in cases where from any cause it were inequitable to enforce them.

On the other hand, in the absence of a positive statute requiring it, it has never been the custom anywhere, in cases of sales made on writs of *fifa* or execution sales, as distinguished from judicial sales proper, to report them to the court for its approval or disapproval of the manner in which such sale has been made. But there always has been in this state, and is now in some of the other states, a statute requiring all sheriffs

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and coroners making sales of real estate on writs of execution or *fifa*, to report the same to the court, etc. The provisions of our statute in reference to the duties of the court in such cases are as follows: "If the court, upon the return of any writ of execution or order of sale, for the satisfaction of which any lands and tenements have been sold, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provisions of this title [Title XIV, Chap. 57, Gen. Statutes], the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such lands and tenements. And the officer on making such sale may retain the purchase money in his hands until the court shall have examined his proceedings as aforesaid, when he shall pay the same to the person entitled thereto agreeably to the order of the court," etc. Sec. 498, civil code, as amended 1875, 38.

It will thus be seen that while the statute provides that sheriff's sales shall pass under the scrutiny of the court, yet it falls far short of making them judicial sales in the well understood sense of those terms. Had it been the intention of the legislature to abolish the distinction between sheriff's sales and judicial sales, I think it would have provided that the powers and duties heretofore exercised by courts of equity in confirming and setting aside sales of real estate by masters and commissioners should thereafter prevail in all cases of sales by sheriffs on execution. But clearly such was not the intention of the legislature, but only to make it the duty of the court in every case to see that it appeared *prima facie* that the process of the law had not been abused by the ministerial officer charged with its execution.

It is true there are some cases and text writers which seem to hold, or at least intimate, that in those states where execution sales are required by statute to be reported to the court for confirmation, such sales thereby become judicial sales. And one eminent author, Mr. Rorer, in his work on Judicial Sales, p. 28, says that in such states "such confirmation is a matter of discretion in the court," etc. As applied to this state I do not agree with the author, but on the contrary think that the statute making it the duty of the court to examine the report of the sheriff in cases of sales of real estate on execution or *fifa* should be strictly construed. And this construction I think is necessary in order that the confidence of bidders and the public in such sales be upheld.

The Iowa cases are not authority in this state for the reason that the code of that state under which the cited cases arose and where decided, expressly provides for setting aside sheriff's sales made on execution issued on judgments which were not a lien on the land sold at the time of the levy, and such fact was unknown to the purchaser at the time of the sale. Code of 1860, sec. 3321.

The Ohio cases cited are equity cases, and the sales therein judicial sales proper, in which, upon the principles herein contended for, the court had almost unlimited discretion. The only exception is the case in 1st Ohio, in which the only point decided was that a sheriff's deed was inadmissible to prove the grantee's title, until the sale on which it was executed had been reported to the court and confirmed.

In the case at bar it is not charged that there was any abuse of the process of the law. Indeed, there is nothing complained of which would be heard from the mouth of either of the original defendants by any court, legal or equitable. But were this a judicial sale—

a sale made by the court, which is no sale in any proper sense until it passes the scrutiny of the court, as well in respect to the adequacy of the price and questions purely equitable as in respect to those purely legal matters provided for in the section of the statute just quoted—in that case, Mr. Lamb, the purchaser, might apply to the court for relief from his bid, but even then he would have to make a showing of his having been misinformed of the state of the title, or misled into bidding by means other than his own spirit of adventure. The defendants (other than Lamb) were indebted to the plaintiff. They had conveyed their property, as he thought, for the purpose of defrauding their creditors. He sued out an attachment, and attached the lot in question, and in due time obtained a judgment on his claim, and procured the proper execution for carrying it into effect. Two different courses were then open to him, either of which it was competent for him to pursue. He could bring his action to set aside the alleged fraudulent conveyance, and thus remove the impediment to the sale of the lot to satisfy his judgment, or he could pursue the course which it seems he sought to pursue: cause the lot to be advertised and offered for sale by the sheriff, and unless some other party should see fit to become the purchaser, bid it off himself, and thus put himself in a position to litigate the title, with the alleged fraudulent grantee of the defendants.

But it will be readily seen that if the position of the defendants and of the district court is correct, it is within the power of every volunteer to prevent the exercise of this right by coming to the sale and outbidding him, and then come into court, and by alleging that the defendant had made a conveyance of the lot before the legal proceedings—a fact which was spread upon the records of the court at the very commence-

Bachle v. Webb.

ment of the suit—have the sale set aside and the whole proceeding, with all its expense, come to naught. The law does not indulge in any such pastime.

The fourth point made by the defendants in their motion, on which the sale was set aside, does not seem to be insisted upon in their brief, nor could it be sustained. A full conveyance of real estate, unaccompanied by a defeasance, is not an incumbrance in any sense of the word, and it would have been a violation of duty on the part of the county clerk to have reported the quit claim deed from Wheeler to Nichols as such, and consequently his failure to do so was no ground for setting aside the sale.

The order setting aside the sale is therefore reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JULY TERM, 1881.

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.
 " GEORGE B. LAKE, } JUDGES.
 " AMASA COBB, }

FIRST NATIONAL BANK OF SOUTH BEND, INDIANA, PLAINTIFF IN ERROR, v. LEMUEL J. GANDY AND FARMERS' AND MERCHANTS' BANK OF YORK, GARNISHEE, DEFENDANTS IN ERROR.

Garnishment of Money deposited in bank by county treasurer. The plaintiff in error had a judgment against L. J. G. The latter as county treasurer had deposited—generally in the F. & M. Bank—\$1,500. Process of garnishment on the above judgment against defendant Bank. Answer by Bank that said money was deposited by L. J. G. as treasurer of York county as public funds. *Held*, that in the face of the public law prohibiting the depositing of public funds, such a defense could not be heard either from L. J. G. or defendant Bank, and that the bank was liable on process of garnishment.

11	481
32	898
11	431
38	707
38	715
39	367
11	431
46	719
11	431
47	509
47	525
11	431
551	36
11	431
558	64
11	431
62	444

ERROR to the district court for York county. Tried below before Post, J.

France & Sedgwick, for plaintiff in error, cited *State v. Keim*, 8 Neb., 63. *Perley v. County of Muskogon*, 32 Mich., 132, and cases cited. *Shelton vs. The State*, 53 Ind., 331. *Commercial Bank v. Hughes*, 17 Wend., 94. Laws 1879, sec. 91. General Statutes, 749, sec. 124.

Scott & Conner, for defendants in error. The account at the bank was in the name of "York county, Nebraska, by L. J. Gandy, treasurer." The money deposited was "public money." The law will not compel payment of individual debts of treasurer out of this money. Laws of 1879, 156. By this act money is under *official* control. It gives a right of action to the officer and his successor. The only party in interest is the public, and it can make no difference in principle that the action is authorized to be brought in the name of the officer, as it is only another way of designating the county itself. *Cairnes v. Bleness*, 40 Wis., 475. *Carpenter v. Tatro*, 36 Wis., 301. *Sacramento Co. v. Bird*, 31 Cal., 73. Privity of contract and of interest must, in general, combine, in order to charge the garnishee in respect of property of the defendant, and in cases where the garnishee has in his possession property or money which he is bound by contract to pay the defendant, and where the effects in the garnishee's hands belong to the defendant as trustee or agent for others, the garnishee is not bound. And where money is deposited in a bank by one as agent, and the account is understood, both by the depositor and the bank, to be an agency account, there is no privity of interest. Drake on Attachment, secs. 489, 491, 454, note b.

COBB, J.

This is a controversy between the plaintiff in error and the Farmers' and Merchants' Bank of York, as garnishee of L. J. Gandy. The plaintiff recovered a judgment some time ago against the said Lemuel J. Gandy, and having caused an execution to be issued thereon and placed in the hands of the sheriff of York county, also sued out a process of garnishment against the Farmers' and Merchants' Bank of York county as a debtor of the said Lemuel J. Gandy. The bank appeared by its assistant cashier and made the following disclosure:

Wm. A. Sharrar, sworn on the part of the plaintiff, says in answer to garnishee heretofore served on him, I am assistant cashier of the Farmers' and Merchants' Bank of York, York county, Nebraska, am well acquainted with the defendant, Lemuel J. Gandy.

Q. State, Mr. Sharrar, if the Farmers' and Merchants' Bank is indebted to Mr. Lemuel J. Gandy?

A. Yes, sir, not indebted to Mr. Gandy.

Q. Has Mr. Gandy left money at the Bank?

A. Yes, he left money there.

Q. When?

A. First date.

Q. How was that money left there?

A. As the money of York county, by L. J. Gandy, as county treasurer.

Q. How much money was left there?

It is here admitted by the plaintiff and Lemuel J. Gandy, defendant, that there is now, and was at the time of the service of the writ of garnishment, money enough in the possession of the Farmers' and Merchants' Bank to pay the judgment of plaintiff, and not less than fifteen hundred dollars. That said amount of money, not less than \$1,500, so in the possession of

said Farmers' and Merchants' Bank, deposited there as the money of York county, by defendant L. J. Gandy, as treasurer of said York county, and was subject to the check of L. J. Gandy as treasurer of York county, and that such funds were collected by said Gandy, as treasurer of York county, and deposited in said bank by him as such treasurer for safe keeping.

Q. Were the funds subject to the check of L. J. Gandy, county treasurer?

A. Yes, sir, his check as county treasurer.

Q. Was it subject to his personal or private check?

A. No, sir.

It thus appears that Mr. Gandy, the county treasurer, had deposited fifteen hundred dollars of the money which he had received from the tax payers of the county in the Farmers' and Merchants' Bank. By means of the process of garnishment, the district court was called upon to define the status of the money thus deposited, or rather the relationship assumed by the said Farmers' and Merchants' Bank towards individuals and the public by accepting such money as a general deposit, and placing it among its own funds. As I understand it, that court decided that this money still remained public funds although deposited in a private bank and probably paid out to its customers. Or, in other words, that by virtue of the making of the said deposit, the Farmers' and Merchants' Bank became the debtor of York county and not of Mr. Gandy. In the case of *The State v. Keim*, cited by counsel on either side, this court sought to express the very opposite of such conclusion as applied to a deposit of state money made by the state treasurer in a bank, and I know of no difference in this regard between state and county funds. We there stated upon authorities cited, that the depositing of money, generally, in

First National Bank v. Gandy.

a bank was, in legal effect, the loaning of the money to the bank. I am quite satisfied with that opinion as a whole, as well as with the particular paragraph of it now under consideration. The loaning of any part of the public money, by any person standing in the relation to it that a county treasurer does, is by statute declared to be a high crime, punishable by fine and imprisonment in the penitentiary. As the law now stands, the district court only takes cognizance of crimes when they are presented by the indictment of a grand jury. But certainly when the statute declares the doing of a certain thing a crime, the court cannot construe the doing of that same thing as conferring any rights upon either of the participants in the doing of that thing. Neither party to any such prohibited transaction can be heard in a court of justice to urge such act, or any quality thereof, either as a cause of action or ground of defense. I do not deem it necessary to make any reference to the act of Feb. 24, 1879, cited by counsel for defendants in error, further than to say that by its own terms said act only covers cases of loans of public funds made before the passage of said act, and so does not apply to the case at bar. Whatever cause of action the county might have against the Farmers' and Merchants' Bank for knowingly receiving its funds on deposit from the county treasurer, the bank has no defense against the process of the plaintiff on the ground that the funds which it received from Mr. Gandy were county funds which he was prohibited by public law from depositing in any bank. It does not lie in the mouth of Mr. Gandy, or any of his privies, of which the Farmers' and Merchants' Bank is one in respect to these funds, to deny that they are the private money of Mr. Gandy, which alone he had a right to deposit in bank, and the bank had a right to receive from him on deposit.

It follows, therefore, that the judgment of the district court must be reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

11	436
16	574
11	436
53	571
11	436
59	711

PATRICK MURRAY, PLAINTIFF IN ERROR, V. SCHOOL DISTRICT No. 3, IN PLATTE COUNTY, DEFENDANT IN ERROR.

Practice: ERROR: MOTION FOR A NEW TRIAL: EXCEPTION. In order to obtain a review in the supreme court by proceedings in error of questions properly included in a motion for a new trial, it is indispensable that exception be taken to the ruling of the court below on the motion.

ERROR to the district court for Platte county, SAVAGE, J., presiding in absence of Post, J. The case was heard here and decided at January term, 1880, but a motion for a rehearing having been made, the opinion was reserved by the court until the filing of the opinion on the motion at the present term.

Whitmoyer, Gerrard & Post, for plaintiff in error.

N. Millet & Son, for defendant in error.

LAKE, J.

This is a petition in error from Platte county, and must be determined on the first point made in the brief of counsel for the defendant in error, viz.: that "there is no exception to the order overruling the motion for a new trial." In order to obtain a review in this court by proceedings in error of questions properly included in a motion for a new trial, it is indispensable that ex-

ception be taken to the ruling of the court below on the motion. *Lowrie v. France*, 7 Neb., 191. *Foster et al. v. Robinson*, 6 Ohio Stat., 90.

In the court below the case was sent to a referee to take the testimony and report upon all questions, both of law and fact. It appears that a motion for a new trial was filed with the referee, but there is nothing to indicate that he acted upon it. This motion was subsequently refiled in the district court, but whether it was there considered is not shown. On the coming in of the report of the referee there were also filed certain "objections" thereto, which probably were duly considered by the court and overruled at the time of entering final judgment in the action, as in the journal entry thereof it is recited that it was "ordered that the said exceptions to said report be overruled," and judgment was thereupon rendered conformably with the recommendations of the referee. At the end of this judgment entry it is stated that "the defendant excepts." This exception, however, is indefinite, so much so that it cannot be known whether it was directed to the overruling of the "objections," or to the final judgment of the court. And further, in this assignment of objections no demand was made for a new trial. It is clear therefore that the defendant can take nothing in consequence of this exception.

There was, however, a formal motion made to the court for a new trial on the same day that final judgment was given, specifying, as we must presume, all the grounds relied on. This motion, as the record shows, was the only one which the court acted upon, and it was overruled two days afterwards. To this denial of the motion it does not appear that any objection was made, or exception taken, wherefore we must consider that the ruling was at the time entirely satisfactory and the several questions involved therein not now properly

open to review. The several errors now here assigned as ground for reversing the judgment of the district court, having been included in this motion for a new trial, were finally settled by the order of the court thereon.

JUDGMENT AFFIRMED.

SAME V. SAME.

- 11 438
42 554
1. **Referee. NEW TRIAL.** A referee to whom a cause is referred to take testimony, and report to the court upon all the issues of fact and law, has no authority to grant a new trial.
 2. ———. In case the decision of the referee is unsatisfactory, and a new trial is desired, the motion must be made to the court, as directed in the code of civil procedure, secs. 814 to 818, which alone has the power to grant it.
 3. ———. Exceptions to the report, although proper practice in certain cases, as where it fails to cover all the issues submitted, or the conclusion drawn from the facts found is unwarranted, and the like, cannot supply the place of a motion for a new trial for matters proper to be included therein.
 4. ———. Where no exception is interposed to an order granting or overruling a motion for a new trial, the result is always deemed to have been satisfactory to the parties at the time, and they cannot afterwards be heard to complain.

MOTION for a rehearing of the preceding case.

LAKE, J.

By a reference made in the motion for a rehearing, we see that we were mistaken in saying that the motion for a new trial filed with the referee was not acted upon by him. He did, formally, overrule it. That fact, however, is quite unimportant, as it was a void act, he being without authority to order a new trial. That

power is wisely intrusted to the court alone, to be exercised in a proper case, on motion, after the report has been brought in. "A new trial is a re-examination in the same court after a verdict by a jury, *report of a referee*, or a decision by the court." Sec. 314, code of civil procedure. "The application for a new trial must be made at the term the verdict, *report*, or decision is rendered." Sec. 316, Id. "The application must be by motion, upon written grounds filed at the time of making the motion." Sec. 317, Id. "When the grounds for a new trial could not, with reasonable diligence, have been discovered before, but are discovered after the term at which the verdict, *report of referee*, or decision was rendered, or made, the application may be made by petition, filed as in other cases, on which summons shall issue and be returnable and served," as in the commencement of an action. Sec. 318, Id. [Comp. Stat., 572, 573.]

These several provisions show conclusively, we think, that the granting of new trials is not one of the powers given to referees, but that the court alone can review decisions in this manner.

Doubtless there may be matters concerning the report of a referee prejudicial to a party not proper to be included in a motion for a new trial. These may be reached and brought to the notice of the court by exceptions filed to the report. But exceptions to the report cannot supply the place of a motion for a new trial for matters proper to be included therein. Maxwell's Pleading and Practice, 538, note 1. An exception to such report would be the suitable course to pursue where it fails to cover all of the issues submitted by the reference, or where the conclusion drawn from facts found is unwarranted, and the like.

As to the exception noted in the record, which appears to have been made on the twenty-seventh of

February, 1878, at the time the judgment was rendered, we repeat what was said in substance in the former opinion, that it is too indefinite to indicate with certainty to what it was intended to apply. The record shows that on that day the cause came on to be heard before the court upon the pleadings and the report of the referee; also the motion for judgment upon said report, and the exceptions of the defendant thereto; whereupon it was ordered that said exceptions be overruled, and the report confirmed. Thereupon, on consideration, *the court found* that the defendant was indebted to the plaintiff in the sum of \$117.10, and interest from the fifteenth day of April, 1876. It was "therefore considered by the court that the said plaintiff recover from the said defendant the sum of one hundred and thirty-eight dollars and eighty-eight cents and its costs herein expended, taxed at \$132.91." This is followed with this: "The defendant excepts."

The place of this indefinite exception, being as it is at the end of the paragraph containing the judgment, would seem to indicate an intention to apply it to that alone. The fact that *final* judgment may be reviewed without exception having been interposed at its rendition is of no special force against such presumption, when the practical fact is that such exceptions are almost always made to unsatisfactory judgments. If the exception were in fact made to one of the preceding orders, to that overruling the exceptions to the report, or to the one by which the court found the amount of the indebtedness, it should either have immediately followed that particular order, or have mentioned it in direct terms.

But, as we before held, the plaintiff in error is especially estopped from complaining of the judgment, on account of anything that preceded it, for the reason that all matters of complaint were addressed to the

Ewarth v. Nier.

court by the motion for a new trial, to the order overruling which no exception was taken. Where no exception is interposed to an order granting or overruling a motion for a new trial, which is not a final judgment, the result is always deemed to have been satisfactory to the parties at the time, and they cannot afterwards be heard to complain. For these reasons the motion for a re-hearing must be denied.

RE-HEARING DENIED.

WILLIAM EWARTH, PLAINTIFF IN ERROR, V. LUDWIG
NIER, DEFENDANT IN ERROR.

Performance: CONTRACT FOR WORK AND LABOR. In an action for work and labor, the answer admitted the performance of the same, but alleged that the services were to be rendered gratuitously. Judgment being rendered for the defendant, *held*, that as the defendant had failed to prove that at least a portion of the services sued for were to be gratuitous, the judgment must be reversed.

ERROR to the district court for Lancaster county.
Tried below before POUND, J.

Burr & Marshall, for plaintiff in error.

Lamb, Billingsley & Lambertson, for defendant in error.

MAXWELL, CH. J.

This is an action to recover for work and labor. The plaintiff alleges in his petition:

First. That in June, 1879, he, at the defendant's request, plowed fifteen acres of land for him, which was reasonably worth \$2 per acre, amounting to \$30.

Second. That in January, 1879, he, at the defendant's request, hauled fifteen loads of grain from the defendant's farm to the city of Lincoln, which was worth \$36. Also, in April of that year, he set out trees for defendant, which services were worth \$2.

Third. That in the fall of 1878, he, at the defendant's request, worked fourteen days with his team husking corn for him, which services were worth \$21.

The defendant in his answer admits that the labor was performed by the plaintiff as alleged in the petition, but alleges that the same was "done and performed under the express and implied agreement between said plaintiff and this defendant that the said plaintiff would not charge this defendant anything therefor," etc. A counter-claim for the sum of \$198.65 is also pleaded. The reply consists of a general denial, and, second, alleges that the matters set up as a counter-claim "were in consideration of said work and labor, and by the terms of said agreement to be given to the plaintiff without charge," etc. On the trial of the cause, the jury returned a verdict for the defendant, upon which judgment was rendered.

The plaintiff brings the cause into this court by petition in error.

The errors assigned are in substance that the verdict is against the weight of evidence.

Section 134 of the code provides that "every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, shall, for the purposes of the action, be taken as true," etc. Comp. Stat., 547.

The answer admits that the labor was performed as stated in the petition, but it is alleged that such services were to be rendered gratuitously. The burden of proof is upon the defendant to establish that fact.

Tingley v. Parshall.

As to some of the items stated in the petition the defendant has entirely failed to prove that the services were to be rendered gratuitously, and as to those, at least, has failed to establish his defense.

As the case must be tried again, we will express no opinion upon the facts. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

R. R. TINGLEY, PLAINTIFF IN ERROR, v. R. F. PARSHALL,
DEFENDANT IN ERROR.

Principal and Agent: CONTRACT: CONVERSION: DEMAND.

Where, by the terms of a written contract, one P. constituted T. his agent to loan money and take securities for the payment of the same, and expressly provided that the authority could be revoked at the request of P. in writing, *Held*, that a demand for the securities in writing, signed by a party claiming to be an attorney of P., without an order in writing, or proof of his authority, was not sufficient to authorize P. to maintain an action for the face value of the securities.

ERROR to the district court for Lancaster county.
Tried below before POUND, J.

Brown, Ryan & Brown, for plaintiff in error.

L. C. Burr and *W. R. Kelly*, for defendant in error.

MAXWELL, CH. J.

This is an action brought by R. F. Parshall as principal, against R. R. Tingley, to recover the face value of certain notes and securities claimed by the principal, which it is alleged Tingley as agent refused to deliver

up. Judgment was rendered in the court below in favor of Parshall for the sum of \$2,894.81. Tingley brings the case into this court by petition in error.

This is not an action for an accounting but for conversion, and had this fact been kept in view on the trial, a large amount of testimony, which does not appear to be relevant to the issue, might have been excluded.

It appears from the record that in the year 1872, the plaintiff and defendant entered into a written contract whereby Parshall did "make, constitute and appoint said R. R. Tingley his true and lawful agent to check out and loan and invest any funds or money that he the said R. F. Parshall may deposit or cause to be deposited to the use of said party of the second part in any bank agreed upon by both parties, to take such securities for the payment of said moneys loaned, with the interest that may accrue thereon, as the said party of the second part may think best; to use all lawful ways and means to collect all notes and other evidences of indebtedness taken or purchased by the party of the second part; to release all mortgages on payment having been made in full to proper parties; to receipt for all moneys in satisfaction of judgments, and to do all business necessary in connection with such loans. All moneys to be let at no higher rate than lawful interest. All notes made payable to R. F. Parshall and made payable to some bank agreed upon by parties, and all transactions and contracts to be made in the name of R. F. Parshall, checks and receipts signed R. F. Parshall in the handwriting of R. R. Tingley as agent. At any time said R. F. Parshall may choose himself or any other agent to attend to his business, said party of the second part agrees at any time to turn over to him or an agent selected by him, all notes and other evidences of indebtedness taken by the said Tingley for R. F. Par-

Tingley v. Parshall.

shall. The said party of the second part agrees for himself, his heirs, executors, administrators, or assigns, that he will be responsible for all losses incurred in the handling of said funds, and will account to the said party of the first part or his legal representatives for all funds so checked out of said banks, with interest at 12 per cent per annum. And that he will, at the request of said party of the first part *in writing*, pass over or cause to be passed over to him or his representatives, all notes, securities, moneys, belonging to him," etc.

This instrument is signed by Parshall. It is claimed that the instrument was afterwards varied by parol as to the compensation to be paid Tingley, and releasing him from his guaranty. To what extent in those particulars the contract was varied it is unnecessary now to enquire. Tingley received from Parshall \$6,171.08. In May, 1873, one Beatty, a son-in-law of Parshall, made what purports to be a settlement with Tingley, and found that the profits derived from the loans amounted to the sum of \$2,694.85, and the commissions due Tingley amounted to the sum of \$898.25, and that the assets in Tingley's hands amounted to the sum of \$7,967.45. It also appears that prior to 1878, Tingley had repaid Parshall more than \$7000, and had also conveyed a quantity of real estate, the consideration of which is in dispute. But it is conceded that the amount paid to Parshall is nearly or quite equal to the original loan at 12 per cent interest thereon. In April, 1879, the following notice was served on Tingley by a constable:

"LINCOLN, Nebraska, April 12, 1879.

"To R. R. TINGLEY,

"You will please take notice that according to the agreement made between us, February 21, 1872, for the loaning of moneys by you as my agent, I do hereby

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request you to pass over or cause to be passed over to me or L. C. Burr, as my representative, all notes, securities, etc., belonging to me.

"Yours respectfully,

"R. F. PARSHALL,

"By (name of the attorney), Attorney."

This action was commenced on the 1st day of May, 1879. The testimony fails to show that any notice in writing signed by R. F. Parshall has ever been served on Tingley, or that Tingley had any notice or knowledge that the party signing the name of Parshall to the above notice was lawfully authorized to do so. No action had been commenced, and an attorney as such had no authority to give such notice. And even if there had been authority to give the notice, the constable had no authority to receive the notes and securities. The court refused to give an instruction, that the evidence as to the authority of the party signing the notice was not sufficient to entitle him to receive or for Tingley to deliver the assets to him. In this there was error. The parties by their own express agreement have provided the mode in which Parshall may terminate the agency and Tingley deliver the securities. The parties may waive the mode agreed upon, but there is nothing in the testimony tending to show any such waiver. But it is said the notice complies with the terms of the agreement, being signed by the attorney of Parshall.

Section 7 of Chapter 3 of the Revised Statutes of 1866, provides that an attorney has power to execute: "I. To execute in the name of his client a bond for an appeal, certiorari, writ of error, or any other papers necessary and proper for the prosecution of a suit *already commenced*. II. To bind his client by his agreement in respect to any proceeding within the scope of proper duties and powers; but no evidence of

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any such agreement is receivable, except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court. III. To receive money claimed by his client in an action or proceeding, during the pendency thereof or afterwards, unless he has been previously discharged by his client, and upon payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment." Comp. Stat., 65.

The authority to give notice to an adverse party of the termination of his agency for another, at least before the commencement of an action, is not among the express or implied powers of an attorney. Such notice must come from the principal and not from an employee, unless he is specially authorized for that purpose. The authority of an agent may be terminated by the limitation of the power to a particular time; by the execution of the business which he was constituted to perform; by a change in the condition of his principal; by express revocation of his power; and by the death of the principal. 2 Kent's Com., 643.

The notice in this case was a demand upon Tingley for the securities in his hands. This should have been signed by Parshall. The agent had a right to know that it was his act, and also to be protected by his order in delivering securities to a party claiming to be his agent. As there is an entire failure of proof in this regard, it is decisive of the case, and it is unnecessary to consider the other errors assigned. It is apparent from an examination of the record that the object of the contract between the parties was to loan money at usurious rates of interest. And while that purpose does not appear in the written contract, it is clearly shown by the record, and the principal ground on which this action is based is to recover for interest in

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excess of twelve per cent. Whether the guaranty in the written contract extends to this excess may well be doubted. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

11	448
14	686
11	448
81	167
11	448
50	578
53	411

KANSAS MANUFACTURING COMPANY, APPELLANT, v. MARGARET GANDY AND LEMUEL J. GANDY, APPELLEES.

Married Women: MORTGAGE TO SECURE HUSBAND'S NOTE. In September, 1878, one G. gave his note, due in one year, to a manufacturing company. In December following, the wife of G. gave a mortgage on her separate estate to secure the note, there being no extension of the time of payment, nor any new consideration. *Held*, that the mortgage could not be enforced.

APPEAL by plaintiff from a decree rendered in the district court for York county, dismissing plaintiff's suit for the foreclosure of a mortgage.

France & Sedgwick and Lamb, Billingsley & Lamberson, for appellant. The answer does not set up any defense, consequently the plaintiff is entitled to a decree on the pleadings; it is defective in two essential particulars: 1st, it contains no plea of coverture, and 2d, it admits the execution and delivery of the deed or mortgage, in which case the consideration cannot be enquired into for the purpose of avoiding it. Our position and claim is, that coverture must be pleaded, and that a bond and mortgage or any instrument under seal implies a consideration, and none need be proved; *and it is good if it is shown that none was given.* And neither courts of law or equity will allow the consideration to be inquired into for the sake of declaring the instru-

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ment void for want of consideration, but they will for the purpose of ascertaining what is due upon it. *Farnum v. Burnett*, 21 N. J. Eq., 89. *Jamison v. Jamison*, 8 Wharton, 457. *Brown v. Kahnweiler*, 28 N. J. Eq., 313. *Bank of Muskingum v. Carpenter*, Wright, Ohio, 729. *Cooley v. Hobert*, 8 Iowa, 358. *Comegys v. Clarke*, 44 Md., 108. *Huffey v. Carey*, 73 Pa. St., 432. *Wolf v. Van Metre*, 23 Iowa, 397. *Croft v. Bunster*, 9 Wis., 507.

W. T. Scott and *W. W. Giffen*, for appellees. The mortgage is void for want of any new consideration. 1 Jones on Mortgages, sec. 615. 4 Wait Actions and Defenses, 554, sec. 6. *Davidson v. King*, 51 Ind., 224.

MAXWELL, CH. J.

This action was instituted in the district court of York county to foreclose a mortgage executed by Margaret C. Gandy upon her separate estate to secure a note executed by her husband. The defense is want of consideration. The court below found the issues in favor of the defendant and dismissed the action. The plaintiff appeals to this court.

It appears from the bill of exceptions that the defendant, Lemuel J. Gandy, had purchased wagons from the plaintiff to the amount of about \$6,000, giving his notes therefor, and that the note which the mortgage was given to secure was for a portion of the wagons. The note is as follows:

“\$464.00 YORK, NEB., Sept. 16th, 1878.

“Twelve months after date I promise to pay to the order of the Kansas Manufacturing Company four hundred and sixty-four dollars, at McWhirter’s Bank, with exchange, value received, with interest at 12 per cent per annum from January 16, 1879, until paid.

“L. J. GANDY.

“Due Sept. 19, 1879.”

The mortgage to secure this note was executed on the seventh day of December, 1878.

Blackstone says: "A consideration of some sort or other is so absolutely necessary to the forming of a contract that a *nudum pactum*, or agreement to pay anything on one side without any compensation on the other, is totally void in law; and a man cannot be compelled to perform it. As, if one man promises to give another £100, here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And however a man may or may not be bound to perform it in honor or conscience—which the municipal laws do not take upon them to decide—certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for; and therefore our law has adopted the maxim of the civil law that *ex nudo pacto non oritur actio*. But any degree of reciprocity will prevent the pact from being nude." 2 Blackstone's Com., 445.

Kent says: "It is essential to the validity of a contract that it be founded on a sufficient consideration. It was an early principle of the common law that a mere voluntary act of courtesy would not uphold an *assumpsit*, but a courtesy showed by a previous request would support it. There must be something given in exchange, something that is mutual, or something which is the inducement to the contract, and it must be a thing which is lawful and competent in value to sustain the assumption. A contract without consideration is a *nudum pactum*, and not binding in law, though it may be in point of conscience." 2 Kent's Com., 463.

Patteson, J., in *Thomas v. Thomas*, 2 Q. B., 859, says: "A consideration means something which is of some value in the eye of the law moving from the plaintiff. It may be of some benefit to the defendant,

or some detriment to the plaintiff, but at all events it must move from the latter."

Originally, under the doctrine of uses, the relationship of blood or the marriage relation, when supported by a seal, was held sufficient to raise a use. But if there was no seal, and the contract was intended to take effect as a bargain and sale, which might have its origin in parol, a valuable consideration was necessary. See 2 Rolle Abr., 788, p. 15. Uses originally were equitable estates, which, under the operation of the statute of uses, were converted into legal, the statute joining the use and possession of the land together so that the owner should possess the same estate in the use and possession. Sanders says: "Uses may be raised either upon a pecuniary consideration, or upon what is called a good consideration, which is that of blood or marriage. Whatever be the form of the conveyance creating and transferring a use upon the former consideration, it is a bargain and sale, and must be enrolled as such; but conveyances raising upon or by virtue of the latter are termed covenants to stand seized, and they are not within the words of the statute of enrollments, nor within the policy of it, because the consideration of blood and marriage is of a public nature." 2 Sand. on Uses and Trusts, 96-7.

I have thus stated the principles governing the consideration of contracts, because in some of the cases they seem to have been overlooked. It is the consideration that gives vitality to a contract, and without it the contract cannot be enforced. If, in an action between the original parties to a promissory note, the maker may plead that the note was without consideration, and, if this defense is established, defeat a recovery thereon, why may not a party, who has executed a mortgage to secure a precedent debt of another, be permitted to show that there was no consideration for

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the mortgage? The cases rest upon the same principle. In the one case the plaintiff seeks to recover a judgment against a defendant which may be satisfied out of any property he may possess. In the other it is sought to subject specific property of the defendant to the payment of the amount found due on the mortgage. In both cases there must be a consideration to support the contract. In the case at bar the plaintiff surrendered nothing, nor did the defendants, or either of them, receive any benefit whatever from the execution of the mortgage. It was given to secure a note that had at that time nearly ten months to run, and there was no extension of the time of payment, nor any consideration for its execution. It cannot therefore be enforced. *Wearse v. Pierce*, 24 Pick., 141. *Conwell v. Clifford*, 45 Ind., 392. *Smith v. Newton*, 38 Ill., 230. The judgment of the court below, dismissing the action, is therefore affirmed.

JUDGMENT AFFIRMED.

W. P. NICHOLSON, PLAINTIFF IN ERROR, V. MARTIN E.
BARNES, DEFENDANT IN ERROR.

Promissory Note: LIABILITY OF INDORSER. A promissory note was dated at Grand Island, Neb., made payable at ———, and had beneath the signature of the maker the words "Danebrog, Howard Co." In an action by the endorsee against the endorser, *Held*, on demurrer to the petition, that the allegations of demand at the banks at Grand Island, and that the defendant had no residence or place of business there, there being no allegations that the maker had absconded, or that inquiry had been made at Danebrog, were insufficient to charge the endorser.

ERROR to the district court for Hall county. Tried below before Post, J.

Thummel & Platt and *Abbott & Caldwell*, for plaintiff in error, cited *Story Prom. Notes*, sec. 235. *Townsend v. Star Wagon Co.*, 10 Neb., 615. *Spies v. Gilmore*, 1 Comstock, 321.

Batty & Ragan, for defendant in error, cited 1 *Parsons Notes and Bills*, 427, 567. *Smith v. Philbrick*, 10 Gray, 252. 1 *Daniel Neg. Instr.*, 510, 567. *Brents, executor, v. Bank of Metropolis*, 1 Pet., 89. *Anderson v. Drake*, 14 John., 114. *Sussex Bank v. Baldwin*, 2 Harrison, 487. *State Bank v. Hurd*, 12 Mass., 172. *Meyer v. Hibsher*, 47 N. Y., 265. *Adams v. Sherill*, 14 How Pr., 297.

MAXWELL, CH. J.

This is an action by the endorsee against the endorser upon a promissory note, of which the following is a copy:

“GRAND ISLAND, NEB., Oct. 29, 1878.

“Nine months after date, for value received, I promise to pay to the order of A. R. Oliphant \$71.25 at ———, with interest at ten per cent per annum from date until paid, together with a sum equal to ten per cent of said amount as attorneys’ fee, if action is brought on this note or the mortgage given to secure the same, or if the same is not paid when due.

“\$71.25. [Signed] JERRY TYRELL,
“Danebrog, Howard county.”

A copy of the note is attached to and made a part the petition. It is alleged in the petition “that said note was made payable in the town or city of Grand Island, in Hall county, Nebraska, but not made payable at any particular place in said Grand Island, and that on the day and date when said note became due said plaintiff made diligent search and inquiry throughout the entire town of Grand Island for the maker

of said note, but was wholly unable to find him or learn of his whereabouts." It is also alleged that the note was presented to the several banking houses in Grand Island for payment, and payment thereof was refused, and that no part of the same has been paid, etc.

The defendant, Nicholson, demurred to the petition upon the ground that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was overruled and judgment entered in favor of Barnes. Nicholson brings the cause into this court by petition in error.

In the case of *Townsend v. The Star Wagon Co.*, 10 Neb., 619, it is said: "The contract which the plaintiff in error entered into by indorsing said note was, that if the same should be duly presented for payment to the makers at maturity—either to them personally or at their residences or places of business—and the same was not paid, and he should be duly notified of such presentation and non-payment, that then he would pay the money called for by the note, together with legal costs of such demand and notification."

In this case it is alleged in the petition that the demand was made at the banks in Grand Island. Is such demand sufficient to charge the endorser? The presumption is that the maker resides at the place where a note is dated, and that he contemplated payment at that place. 3 Kent Com., 97. *Stewart v. Eden*, 2 Caines Rep., 127. *Duncan v. McCullogh*, 4 Serg. & R., 480. *Lorenz v. Scott*, 24 Wend., 358. But it is a presumption merely; and if the maker resides elsewhere within the state when the note falls due, and that place be known to the holder, demand must be made at the maker's place of residence. 3 Kent Com., 97. *Anderson v. Drake*, 14 Johnson, 114. *Galpin v. Hard*, 3 McCord, 394. The reason is the holder of a note is bound to use reasonable and proper diligence to find the maker and demand

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payment, where no particular place is designated for payment.

The endorser undertakes conditionally to pay if the maker does not, and this imposes on the holder the necessity of taking the proper steps to obtain payment from the maker. The allegations in the petition that a demand was made at the banks at Grand Island and that the maker had no residence or place of business there, are not sufficient. There is no allegation that the maker had absconded, or that his residence was unknown, or of any fact to excuse an actual demand. The words "Danebrog, Howard Co.," beneath the signature, evidently were intended to indicate the residence of the maker; but there is no allegation of a demand at that place or that he had removed therefrom. But it is said that the residence being indicated beneath the signature, it is not binding on the holder to make a demand at that place. Undoubtedly this designation of the residence would not be sufficient to fix the place where alone a demand should be made; but it is a circumstance to put the holder on inquiry as to the residence of the maker. In all probability had inquiry been made at Danebrog, the maker would have been found.

It is insisted that it being alleged in the petition that the note was payable at Grand Island, that this fact is admitted by the demurrer. In answer to this objection it is sufficient to say, that the allegations of the petition must be construed together. The note which is made part of the petition, shows that no place of payment was designated, and that the allegation in the petition that Grand Island was the place, is untrue.

As there must be a new trial in this case, I desire to call attention to the allegation of the petition as to the endorsement, which is as follows: "Said plaintiff further avers that after the date of the execution and

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delivery of said note, and before the same became due and payable, the said A. R. Oliphant for a valuable consideration sold, endorsed, and delivered said note to said defendant, who then and there for a valuable consideration, and before said note became due, sold, endorsed and delivered the same to said plaintiff." No copy of the endorsement is set out in the petition.

Section 129 of the code provides that "where others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties in the action, it shall be necessary to state also the kind of liability of the several parties, and the facts as they may be which fix their liability." This would seem to require a copy of the endorsement. The petition at least must show the nature of the liability of the endorser—that is, the character of the endorsement. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

11	456
13	488

11	456
47	371

11	456
49	67

11	456
58	732

11	456
59	412

JOSIAH FRY, PLAINTIFF IN ERROR, V. W. W. TILTON,
DEFENDANT IN ERROR.

1. **Practice.** Instructions should be filed with the clerk before being read by the court to the jury. And the word "given" or "refused" should be written on the margin of each instruction given or requested. But a failure to comply with the statute is not ground of error, unless excepted to.
2. **Evidence.** When the testimony is conflicting as to the price agreed upon in the sale of personal property, it is competent to show the value of the property at the time of the sale, as tending to show what the real contract probably was.

ERROR to the district court for York county. Tried below before WEAVER, J.

France & Sedgwick, for plaintiff in error.

Montgomery & Harlan, for defendant in error.

MAXWELL, CH. J.

This action was brought in the district court of York county, upon an account to recover from the defendant the sum of \$153.65. The defendant in his answer admits the account, but alleges that in pursuance of a contract he delivered to the plaintiff thirty cords of soft wood at \$4.75 per cord, amounting to the sum of \$142.50. Two cords of hard wood worth \$6.00 per cord, \$12. And paid cash \$8.74. He asks judgment for the sum of \$9.59.

The plaintiff in his reply admits receiving eleven cords of soft wood, at \$3.75 per cord, and one cord of hard wood at \$5.00 per cord. On the trial of the cause a verdict was rendered in favor of the defendant for the sum of thirty-five cents. Various errors are assigned, the more important of which will be considered in their order.

It is objected that the verdict is against the weight of evidence. We have carefully read the entire testimony, although it is quite voluminous, and while it is somewhat conflicting, in our opinion it fully sustains the verdict.

Objection is made to the action of the court in not filing the instructions with the clerk before they were read to the jury, and in permitting the jury to take the instructions to the jury room, and also in neglecting to write the word "given" or "refused" on the margin of the instructions, as required by the statute.

The act approved February 25, 1875, provides that "it shall be the duty of the judges of the several district courts, in all cases both civil and criminal, to

reduce their charge or instructions to the jury to writing, before giving the same to the jury, unless the so giving of the same is waived by the counsel in the case in open court," etc.

Section 3 provides that "the court must read over all the instructions which it intends to give and none other, to the jury, and must announce them as given, and shall announce as refused, without reading to the jury, all those which are refused, and must write the word 'given' or 'refused' as the case may be, on the margin of each instruction."

Section 4 provides that: "If the giving or refusal be excepted to, the same may be without any reason stated therefor; and all instructions demanded, as well as all instructions given to the jury by the court on its own motion, must be plainly and legibly written in consecutively numbered paragraphs and filed by the clerk before being read to the jury by the court; and such instructions shall be preserved as part of the record of the cause in which they were given."

The fifth section provides that the neglect or refusal of the court to perform any duty enjoined by the preceding sections shall be error, and sufficient cause for the reversal of the judgment. Laws of 1875, pages 77-8.

The proper construction of this statute was before this court in *Smith v. The State*, 4 Neb., 288. The court say: "It was intended doubtless that each distinct proposition of law or statement of fact should be so set forth as to enable counsel readily to comprehend its purport, and if desirable, except to it by a simple reference to its number." * * "But the right given by this section is one that may be waived, and will be regarded as waived when the instructions are not excepted to."

The question was again before the court in *Tagg v.*

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Miller, 10 Neb., 442, where the presiding judge had failed to write the word "given" or "refused" on the margin of each instruction given or requested, and it was held that to make the error available an exception must have been taken.

Instructions should be filed with the clerk before being read to the jury, but the party complaining must have excepted on that ground to their being read. So with regard to writing the word "given" or "refused" on the margin of each instruction given or requested. The objection is purely technical, and a party seeking to take advantage of a mere technicality must himself be without fault. Besides, there is no doubt that had the attention of the court been called to the matter by an exception the objections would have been removed. As to the objection that the jury were permitted to take the instructions with them to the jury room, we think there is no error, as no exception was taken on that ground.

Objection is made to the testimony of the defendant's witnesses showing the value of wood at the time and place that the defendant delivered his wood to the plaintiff. The testimony as to the price agreed upon was conflicting, the plaintiff testifying that it was \$3.75 per cord, and the defendant that the price agreed upon was \$4.75 per cord. In such cases it is competent to show the value of such wood at the time the contract was made, as tending to show what the agreed price probably was. *Allison v. Horning*, 22 Ohio Stat., 138. *Kidder v. Smith*, 34 Vt., 294. As there is no error in the record the judgment must be affirmed.

JUDGMENT AFFIRMED.

SIDNEY S. BLANCHARD, PLAINTIFF IN ERROR, v. PETER LOGES, DEFENDANT IN ERROR.

Trespass: DAMAGES: EVIDENCE. In an action by B., to recover damages for grain in the field, destroyed by hogs belonging to L., a verdict was rendered for twenty-five cents. There was testimony tending to show the amount and value of the grain destroyed; also that hogs other than those of L. committed a portion of the injury, but there was no testimony tending to show the number of such hogs, nor what proportion of the damage was occasioned by the hogs of L. *Held*, that an objection by B. that the verdict was against the weight of evidence could not be sustained.

ERROR to the district court for Washington county.
Tried below before SAVAGE, J.

L. W. Osborn, for plaintiff in error.

J. Wesley Tucker, for defendant in error.

MAXWELL, CH. J.

This is an action to recover damages for corn and wheat belonging to the plaintiff, which, it is alleged, were destroyed by hogs belonging to the defendant. On the trial of the cause in the court below a verdict for twenty-five cents was rendered in favor of the plaintiff, upon which judgment was rendered. The plaintiff brings the cause into this court by petition in error.

The principal error relied on is that the verdict is against the weight of evidence—that is, that the damages awarded are not commensurate with the injury proved.

It appears from the testimony that in the year 1878 a portion of the plaintiff's corn, in the field, estimated by himself at 800 bushels, worth 12 cents per bushel, was destroyed by hogs; that a quantity of wheat in

the shock, estimated by him at from 100 to 150 bushels, worth 60 cents per bushel, was also destroyed. It also appears that the defendant in August of that year was the owner of nineteen hogs, which escaped from his inclosure and were found in the plaintiff's corn; that the plaintiff impounded thirty-five hogs found in his field, and that a considerable number still remained in the field. It also appears that the plaintiff at that time possessed about one hundred and twenty-five hogs, which were kept up, "except when they broke out." The plaintiff testified that "at that time they did not break out," but there is testimony tending to show that quite a large number of his own hogs were running out at that time. There is also testimony tending to show that the damages to the wheat and corn were inconsiderable. But if the damages are as great as claimed by the plaintiff, still it appears that the injury was not all committed by the defendant's hogs. And there is no testimony tending to show the comparative amount of damage committed by them, nor the whole number of hogs committing the injury. This was necessary in order to enable the jury to assess the damages. The whole amount of damages sustained is proved, but there is an entire failure of testimony as to the proportion of the same for which the defendant is liable. There is no basis therefore for this court to review the finding. There is a direct conflict in the testimony as to the amount of damage sustained, and it was properly a case to be submitted to a jury for their determination. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

11	462
16	543
11	462
50	545
52	506

FRANCIS MOORE AND A. C. HAUSH, PLAINTIFF IN ERROR,
V. ALANSON F. DARROW, DEFENDANT IN ERROR.

Costs. D. sued M. & H. in the county court for a balance of \$154.67. M. & H. answered denying D.'s cause of action and setting up an offset against him amounting to \$138. The jury found that there was due from the defendants to the plaintiff upon the cause of action set forth in his bill of particulars, the sum of \$193.40, and that there was due from the plaintiff to the defendants upon their set-off the sum of \$118.40. That there was therefore found to be due to the plaintiff from the defendants the sum of \$75.00. *Held*, on error, that the plaintiff was not entitled to costs.

ERROR to the district court for York county. Tried below before Post, J.

Scott & Conner, for plaintiffs in error.

France & Sedgwick, for defendants in error.

COBB, J.

Darrow sued Moore and Haush in the county court of York county for an alleged balance of \$154.67. The said Moore and Haush answered, denying Darrow's cause of action, and setting up an off-set against him amounting to \$138. Upon the trial the jury returned their verdict in the following words: "We the jury * * * do find and say that there is due from defendants to the plaintiff, upon the causes of action set forth in his bill of particulars, the sum of \$193.40; and we further find that there is due from the plaintiff to the defendants, upon their set-off, the sum of \$118.40. We therefore find that there is due the plaintiff from the defendants a balance amounting to the sum of \$75, which we assess to the plaintiff as the amount of his recovery." Upon this verdict the county court ren-

Moore v. Darrow.

dered judgment against the defendants Moore and Haush for the said sum of seventy-five dollars and costs. Moore and Haush resisted the judgment for costs, and took the cause to the district court on error, where the judgment of the county court was affirmed, and they now bring the cause to this court on error.

This question has been presented to and decided by this court in the three several cases of *Gere v. Sweet*, 2 Neb., 76. *Beach v. Cramer*, 5 Id., 98, and *Ray v. Mason*, 6 Id., 101. These cases have all held that as they were originally brought in a court other than that of a justice of the peace, and as they might lawfully have been brought before a justice of the peace, that the plaintiff could not recover costs. Indeed I do not see how the court could hold otherwise in view of the language of sec. 621 of the code, which is as follows: "If it shall appear that a justice of the peace has jurisdiction of an action, and the same has been brought in any other court, the plaintiff shall not recover costs."

There is a dictum of Mr. Justice Swan in *Brunaugh v. Worley*, 6 Ohio State, 597, which, if good law, applied to the case at bar would take it out of the rule laid down as well in that case as in the Nebraska cases. After quoting sec. 552 of their code, of which our sec. 621 is a literal copy, the learned judge says: "It is true that at the time the code took effect the court of common pleas and justices of the peace had concurrent jurisdiction when the amount in controversy did not exceed one hundred dollars. Now, by statute, justices of the peace have exclusive jurisdiction of any sum not exceeding one hundred dollars. We are of opinion that this change of jurisdiction did not abrogate the section of the code above referred to, in relation to the recovery of costs by the plaintiff in cases in which it appears from the verdict that the amount in controversy did not exceed one hundred dollars. But there

is this exception to the above rule: Where the plaintiff claims by his petition more than one hundred dollars, and the jury find his claim to exceed that sum, but it is, by counter-claim or set-off allowed by the jury, reduced to an amount less than one hundred dollars, the plaintiff is entitled to his costs. This exception was recognized under the old law, and the same reason exists for its recognition under section 552 of the code." The announcement of this exception was not at all necessary to the disposition of the case then under consideration, as it came within the rule and was not claimed to come within the exception as laid. But even was the above the opinion of the court in the case, and not mere *obiter dicta* as it is, notwithstanding the high character of that court and the judge who delivered the opinion, we could not follow it.

The case at bar is exactly within the exception as laid down by Judge Swan, and I see no reason which would give the plaintiff below in this case costs in the district court, which would not apply to every case of mutual dealings where the debit side of the account amounts to a hundred or even fifty dollars.

Section 1103 of the code is as follows: "The jurisdiction of justices of the peace shall not extend to any case where the sum in question shall exceed one hundred dollars, but may extend to that sum in all cases except as limited in this title." Gen. Stat., 706.

The words "sum in question" in this section cannot mean the amount claimed by the plaintiff, as that construction would deprive the justice of jurisdiction in all that numerous class of cases of mutual accounts where the dealings on either side exceed a hundred dollars, yet where the balance is quite small. It never was the intention of the legislature to drive this numerous class of cases into the county or district court. The policy of the law as expressed in sec. 621 of the code

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is to require the plaintiff, on pain of losing his costs, to bring his suit in the least expensive and most convenient court which can lawfully take jurisdiction of his case, and such policy might be frustrated in any case if the jurisdiction of the court could be controlled by the claim of the plaintiff in a sense to regulate the question of costs.

The judgment of the district court, so far only as the same awards costs to plaintiff in the county court, is reversed with costs to the plaintiffs in error, both in this court and in the district court.

JUDGMENT ACCORDINGLY.

PETER NELSON, APPELLANT, V. O. P. HURFORD AND
OTHERS, APPELLEES.

Usury: CHANGE OF SECURITIES, ETC. Every subsequent security given for a loan originally usurious, however remote or often renewed, is subject to the plea and proof of usury; and when the proof of usury in such case is sufficient, the court will apply all payments of interest upon such usurious loan as a payment, *pro tanto*, of the principal thereof.

APPEAL from the district court for Douglas county.
Tried below before SAVAGE, J.

John D. Howe, for appellant.

W. J. Connell, for appellees.

COBB, J.

This action was brought in the district court of Douglas county for the purpose of foreclosing a mortgage on real estate, given to secure a note for sixteen

11	465
24	684
11	465
30	80
30	491
11	465
41	48
11	465
46	385
11	465
58	338

hundred dollars, dated November 1, 1875, running three years, with interest at ten per cent. Mortgage executed by Oliver P. Hurford and Ella Hurford. Plaintiff admits that the said O. P. Hurford has paid as interest on the said note the sum of \$506.66. The defendants, Oliver P. Hurford, Ella Hurford, and Annie Hurford, answered that the note sued on was executed by said Oliver P. Hurford for the sole purpose of taking up another note of like amount, executed by said O. P. Hurford in the name of Hurford & Brother; which note was dated June 1, 1873, payable to the order of said Peter Nelson, in six months after the date thereof, with interest at the rate of fifteen per cent per annum, interest payable monthly, and which said note of June 1st, 1873, was by said O. P. Hurford so executed for the sole purpose of taking up another note of a like amount, executed by said O. P. Hurford to said plaintiff about three years prior to said time, for money loaned to said O. P. Hurford by said plaintiff. That from the date of the giving of the note first executed until the giving of the note in the plaintiff's petition described, the said O. P. Hurford paid to said plaintiff, and plaintiff knowingly, purposely, and usuriously received from said Hurford interest on said sum of sixteen hundred dollars at the rate of 15 per cent per annum; that said first note, as well as the second note hereinbefore described, provided for the payment of interest at said rate. That the total amount of interest so paid and received on said first note was \$720.00, that the total amount so paid and received on said second note was \$720.00; that defendants admit that on the note in the plaintiff's petition described there has been paid as interest the sum of \$506.66—thus making a total of \$1,945.66, paid as usurious interest to said plaintiff.

The cause was tried to the court without the

intervention of a jury, who found the issues for the defendants and sent them hence without day, and judgment for costs against the plaintiff, who brings the cause to this court on appeal.

Upon looking into the bill of exceptions I find evidence to sustain the finding of the court as to each point, and while there is other and conflicting evidence, I cannot say that the court is not sustained throughout by the weight of evidence.

The point of law that "after the settlement of 1875, the new securities then given and received, the old ones being surrendered, cannot be affected with the vice of usury, if in fact it existed in the former transaction," was raised and earnestly argued by counsel for the appellant. But he cited us to no authorities in support of that position, and as I have been unable to find any, I think there are none. On the contrary the cases uniformly hold substantially to the law as stated by Mr. Justice Swayne, in the opinion of the court in the case of *Walker v. Bank of Washington*, 3 Howard, 62: "The mere change of securities for the same usurious loan to the same party who received the usury, or to a person having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security. Every subsequent security given for a loan, originally usurious, however remote or often renewed, is void."

This cause arose in the District of Columbia, where, under the statute, the agreeing to take usurious interest rendered a contract absolutely void, so that, applied to the case at bar, the doctrine of that opinion gives the appellees the right to have all the interest by any of them paid on the debt sued on, after as well as before the change of securities, Nov. 1, 1875, credited on the principal.

Under the statute of Iowa, a note or contract is not

rendered void by reason of an agreement between parties for usurious interest thereon, but in that state when a plea of usury is interposed and proved, the judgment is for the contents of the note or contract without interest or costs, and another judgment to the state for the use of the school fund for a sum equal to 10 per cent per annum on such usurious note, etc. Construing the statute of that state in the case of *Campbell v. McHarg et al.*, 9 Iowa, 354, the court, per Mr. Justice Woodward, say: "When the attention of the court is called to the question of usury, to say that the inquiry is limited to the identical contract or note before them, and that they cannot look back to a preceding note or notes for which the present one was substituted, is contrary to both the letter and the spirit of all, or nearly all, the adjudications. These teach that however it may be covered by changes and substitutions, if usury be found to exist, either directly or indirectly, its taint continues, and affects all the parts through which it runs. The substitution of one contract for another, the taking of a new note for an old one, will not purge it." *Bank v. Miller*, Sup. Ct. Mo., 11 Reporter, 847.

With the moral question involved in the taking of usurious interest on the one hand, or the pleading of usury for the purpose of avoiding a contract on the other, I do not conceive that the courts have anything to do. The legislature no doubt considered all that, leaving to the judiciary only to administer the law as they understand it.

The judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

J. A. GRIMISON, PLAINTIFF IN ERROR, v. H. C. RUSSELL,
 DEFENDANT IN ERROR.

Practice: LOST PLEADINGS: JUDGMENT WITHOUT PLEADINGS.

There was a petition, demurrer thereto, which had been overruled and exception taken, and answer. Issue being joined by the answer, there was a trial to the court, and the case taken under advisement. Between the trial and judgment all of the pleadings were lost, and objection was made by the defendant in the action to the entry of judgment without any pleadings being on file. But this objection was overruled, and judgment entered without either the pleadings or substituted copies. *Held*, error.

ERROR to the district court for Colfax county. Tried below before Post, J.

Phelps & Thomas, for plaintiff in error.

M. B. Hoxie and *L. D. Chambers*, for defendant in error.

LAKE, J.

Our decision in this case must turn upon the fourth point made in the assignment of errors, viz.: "That the said court erred in rendering said judgment at the September term of said court, when there was no petition, nor answer, nor demurrer, nor writ, nor any pleading, procedure, or process in said action on the files of said court."

The fact is, as the parties agree, and the record shows, that after trial and before judgment—the case having been taken under advisement by the judge—all of the pleadings were lost, and have never been found or supplied. Under this circumstance, was the rendition of judgment against the defendant below, against

11	469
34	314
11	469
43	586
11	469
43	226

his assent, permissible? We think not, for several reasons, of which we will state the following:

In the first place, there is no authority for a court to render judgment against a party defendant, except by his consent, without a petition showing the existence of a cause of action against him and in favor of the plaintiff. And to this petition he must have had the opportunity to answer which the statute gives. The provision for rendering judgment without pleading is found in sec. 433 of the civil code, which declares that "any person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction, and with the assent of the creditor or person having such cause of action, confess judgment therefor, whereupon judgment shall be entered accordingly." But in such case an ordinary judgment, as upon issue joined, will not suffice, for the next section of the code requires that "the debt or cause of action shall be briefly stated in the judgment, or in a writing to be filed as a pleading in other actions." And this statement of the cause of action is essential as a protection to the debtor against a subsequent prosecution upon the same demand.

Another sufficient reason for holding a judgment so rendered erroneous is, that without the pleadings or substantial copies thereof being on file and copied into the record brought to this court, it is impossible to determine many of the questions that may be raised upon the judgment by the defendant in the action. Did the petition state a cause of action in favor of the plaintiff? Without knowing what that pleading contained, we cannot tell; but if it be conceded that it did, then what issue was tendered by the answer, and upon which testimony was required to warrant a recovery? In a contested case, as this one was, these are most important questions, and were distinctly raised by demur-

ring to the petition, and by exceptions taken during the trial, as to the sufficiency of the evidence, under the issue joined, to support the judgment that was finally rendered. With the lost pleadings unsupplied, the clerk of the district court was without the means of making the complete final record required of him by secs. 444, 445, and 446 of the code; and was unable to furnish to the plaintiff in error such transcript of the proceedings in that court as is requisite in bringing the case here by petition in error.

It is contemplated by the code of civil procedure that cases may arise when, even though a party may have verdict found against him, still he shall be entitled to judgment in his favor. Accordingly, it is provided by sec. 440, that: "Where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." One of the grounds of the motion for a new trial in this case was, that the judgment "is contrary to the law of the case." Under this objection, no review of the decision of the court below is possible without access to the pleadings; and by it, the necessity of a distinct understanding of the issue between the parties is made apparent. "Upon the statements in the pleadings," which of the parties was "entitled by law to judgment in his favor" in this case? If a court should be permitted to render a judgment against a party without pleading, and against his will, how could this inquiry be answered by a reviewing court? In such case, would not the decision of the trial court necessarily be final?

By section 137 of the code, provision is made for the substitution, by order of the court, of copies of the original pleadings either lost or withheld by any person. And this is the course that ought to have

been pursued on the discovery of the loss of these pleadings in the court below. For these reasons we are of opinion that the judgment should be reversed, and the cause remanded to the court below for further proceedings.

REVERSED AND REMANDED.

WILLIAM C. GHOST, PLAINTIFF IN ERROR, V. ABEL HILL,
DEFENDANT IN ERROR.

1. **County Court: JURISDICTION: AMERCEMENT OF OFFICER.**
A county court has authority to amerce an officer for failing to return an execution issued by said court and delivered to him.
2. ———: **PRACTICE.** The proper mode of reviewing an order of amercement is by petition in error.

ERROR to the district court for Dodge county. Tried below before Post, J.

William C. Ghost, pro se.

E. R. Dean, for defendant in error.

MAXWELL, CH. J.

This proceeding was instituted in the county court of Dodge county, to amerce the defendant, who is sheriff of Butler county, for failing to return an execution issued out of said court, which it is alleged was delivered to him. The county court made an order amerencing the defendant in the sum of \$96.75. The district court dismissed the proceedings because the county court had no jurisdiction. The case is brought in this court on error.

The only question to be determined is the jurisdiction of the county court.

Section 513 of the code provides that: "If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, which has come to his hands; or shall neglect or refuse to sell any goods and chattels, lands and tenements, or shall neglect to call an inquest and return a copy thereof forthwith to the clerk's office, or shall neglect to return any writ of execution to the proper court before the return day thereof, * * * * * such sheriff or other officer shall, on motion in court, and two days notice thereof in writing, be amerced in the amount of said debt, damages, and costs, with ten per centum thereon, to and for the use of said plaintiff or defendant, as the case may be."

These provisions, if applicable to county courts, confer jurisdiction in cases of amercement. The procedure in county courts, where there are no special provisions to the contrary, is governed by the provisions of the code relative to justices of the peace. Gen. Stat., 263-4. Justices of the peace seem to have no power to amerce an officer, as the provisions of section 1084 provide that an action may be maintained, and the amount of the injury, with twenty per cent penalty thereon, may be recovered. But section 24 of "An act concerning the organization, powers and jurisdiction of probate courts," approved March 3, 1873, (Gen. Stats., 268), provides that "it shall be the duty of the sheriffs of the several counties to execute or serve all writs and process issued by any probate court and to them directed, and to return the same; for any neglect or refusal so to do they may be proceeded against in the probate court the same as for a neglect or refusal to execute or serve process issued out of the district court." Section 25, restricting the service of process to probate

 Miller v. Hyera.

proceedings, was repealed in 1877. Laws of 1877, page 16. *Bowen v. School district*, 10 Neb., 265. This being the case, the county court of Dodge county had authority to entertain proceedings to amerce the sheriff of Butler county for failing to return an execution issued out of said court and delivered to him.

The judgment of the district court dismissing the action therefor, is reversed, and the case is reinstated in the district court. No appeal is allowed in such cases; the proper mode of review is by petition in error, the procedure being the same as in the district court. But there is not sufficient in the record to enable us to determine whether the case was taken to the district court by appeal or on error.

REVERSED AND REMANDED.

11	474
20	316
11	474
35	391
11	474
42	740

JASON G. MILLER, PLAINTIFF, V. REUBEN W. HYERS ET AL., DEFENDANTS IN ERROR.

Execution: STAY OF, WAIVER OF ERROR. J. L. obtained a judgment of foreclosure, etc., v. J. G. M. and M. P. M. They within the time limited by statute filed a written request for a stay of execution, which was duly entered. After the expiration of the stay, an order of sale issued and was placed in the hands of R. W. H., sheriff, for execution. Whereupon J. G. M. commenced an action, and obtained an injunction against J. L. and R. W., sheriff, setting up usury in the note and mortgage, and that he was hindered by excusable mistake, unavoidable accident, etc., from making said defense to the original suit. *Held*, on error to this court, that by taking the stay, J. G. M. waived any error in the proceedings, and was estopped to attack such judgment in any way.

ERROR to the district court for Cass county. Tried below before POUND, J.

R. B. Windham, for plaintiff in error.

Sam. M. Chapman, for defendant in error.

COBB, J.

The defendant in error, Jacob Lefever, obtained a judgment of foreclosure of a mortgage against the plaintiff in error, J. G. Miller, and Mary P. Miller, his wife, at the April term, 1879, of the Cass county district court, to-wit, May 2, 1879. On the 13th day of the same month, the said J. G. Miller and Mary P. Miller filed in the office of the clerk of said court their written request for stay, which was duly allowed and entered. After the expiration of the stay, the plaintiff in that case, Lefever, caused an order of sale to issue, and placed it in the hands of the defendant in error, Reuben W. Hyers, as sheriff of said county for execution. Hyers proceeded as directed by said order of sale to advertise the mortgaged premises for sale on the 8th day of June, 1880.

On the 8d day of June, 1880, the plaintiff in error commenced his action, and obtained an injunction restraining the defendants in error from proceeding with the said sale. The defendants in error answered, denying the several matters set up by the plaintiff as ground for the said injunction; and also setting up the fact of the entry of the stay by the said plaintiff as hereinbefore stated.

Upon the hearing, the district court dissolved the injunction and dismissed the plaintiff's suit, to reverse which judgment he brings the case to this court on error.

There is no brief filed by either party, nor has the attention of the court been called in any way to the particular point or points upon which the plaintiff in

error relies for a reversal of the judgment of the district court.

I will therefore only notice the point which suggests itself as standing in the way of the examination of the case upon its merits, were they ever so well presented.

The statute, sec. 5, of an act approved February 23, 1875, p. 50, laws of 1875, provides that no proceedings in error or appeal shall be allowed after a stay has been taken. While this provision does not in terms prohibit the bringing of an independent action for relief by injunction or otherwise, from the erroneous proceedings of the court in rendering such stayed judgment, yet I think that most if not all the reasons which support the letter of the statute would apply to a case like the one at bar, where a party, after availing himself of a stay of proceedings upon a judgment against him under the statute, seeks by an independent action and injunction to urge a defense to the original suit. I think that when a party avails himself of the statutory stay of judgment he is estopped to attack such judgment in any manner.

The judgment of the district court is affirmed, and the injunction and cause dismissed.

JUDGMENT ACCORDINGLY.

CHAUNCEY H. SMITH, PLAINTIFF IN ERROR, V. RACHAEL
AINSCOW, DEFENDANT IN ERROR.

Garnishment. Defendant in error was the assignee of a note and chattel mortgage, executed by G. P. H., and J. H., his wife, mortgage on household goods claimed by J. H. Edward Ainscow, husband of defendant in error, acting for her, together with G. P. H., took the goods to plaintiff in error, who was an auctioneer, who agreed to sell the goods on the chattel mort-

Smith v. Ainscow.

gage and pay the proceeds, less 10 per cent commission, to defendant in error. While the sale was progressing plaintiff in error was served with process of garnishment as a debtor of G. P. H. He did not notify defendant in error of such proceedings, and made his answer and disclosure therein without revealing on whose account he received the goods, nor that defendant in error was the owner of the chattel mortgage, nor that J. H. claimed to own the goods. The justice ordered him to pay the proceeds of said goods into court, which he did upon receiving a bond of indemnity from one of the garnishing creditors. On suit by defendant in error for the proceeds of said goods, *Held*, that said order and payment thereon by the plaintiff in error constituted no defense to such action.

ERROR to the district court for Douglas county.
Tried below before SAVAGE, J.

Charles J. Green and E. F. Smythe, for plaintiff in error.

George E. Pritchett, for defendant in error.

COBB, J.

The plaintiff in error having filed no brief in this case, nor even pointed out in his petition in error, specifically, the points upon which he relies for a reversal of the judgment, the same should be affirmed *pro forma*. Nevertheless, we have carefully examined the record, but fail to find any material error.

It seems that one George P. Hines, and Jennie Hines, his wife, executed a chattel mortgage to one A. M. Bernstein, upon certain household goods, the property of said Jennie Hines. This mortgage was assigned to Rachel Ainscow, the defendant in error. The mortgaged property—the debt having matured—was taken by George P. Hines, and Edward Ainscow, husband of the defendant in error, to the auction rooms of the plaintiff in error, and placed in his hands for sale at

auction as the property of said Jennie Hines to foreclose said mortgage. The plaintiff in error received said property accordingly, and proceeded to sell it. While the sale was progressing, certain of the creditors of George P. Hines caused process of garnishment to be issued and served on the plaintiff in error, and upon his answer being made in said suit of garnishment, the justice before whom the matter was pending ordered him to pay the proceeds of such sale into court, except \$25.35, which order he complied with, having first been indemnified against all risk in so doing by one of Hines' creditors. Defendant in error then brought suit and recovered judgment against plaintiff in error. To the said claim of defendant in error plaintiff in error pled the said proceedings in garnishment, and the order of said justice to pay said money into court, and his compliance therewith, and now brings this case in error to reverse said judgment.

Had the plaintiff in error notified the defendant in error of the proceedings in garnishment, allowed her to manage the defense thereto, and been particular to have stated all the facts in the case in his answer to the garnishee process, then the order of the justice of the peace upon him to pay the said money into justice's court might have availed him as a defense to this action. But there is no pretense that he ever notified her of the service or pendency of the process of garnishment, or that he would have allowed her or her attorney to take charge of his defense; and in his disclosure before the justice of the peace he seems to have stated everything which would tend to hold him on said process, and nothing—which he evidently could have done—calculated to show to the court the true character of his employment to sell said goods, and that he was accountable to the holder of the chattel mortgage for the proceeds of the sale. At all events

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there was evidence before the district court amply sufficient to sustain its finding and judgment.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

11	479
27	144
11	479
51	290
58	336

ISHAM REAVIS AND E. W. THOMAS, APPELLANTS, V. JOHN J. HORNER AND G. H. PEARSON, APPELLEES.

1. **Replevin: RETURN OF GOODS BY PLAINTIFF.** The sheriff, holding an execution, had levied it upon personal property, consisting of horses, hogs, farming implements, and grain, when the plaintiffs replevied it from him while it remained on the farm of the execution debtor. Judgment having been rendered against the plaintiffs in the alternative for a return of the property, or for its value as found by the court, they tendered it back at the place where replevied. *Held*, that this was a suitable place to return it.
2. ———. When a portion of the goods are lost or so disposed of that they cannot be returned, and their separate value as found by the court can be definitely ascertained, such value in money may be tendered in their stead, together with the remaining goods.
3. ———: **INJUNCTION.** When, after such offer to return the goods replevied, which is not accepted, the defendant proceeds to enforce the alternative judgment for their value, the plaintiff is entitled to an injunction restraining him from so doing.

This was an application for an injunction brought in the district court for Richardson county. The petition alleges that defendant Horner had recovered a judgment against one Findley, and caused an execution, issued thereon, to be levied upon the property in controversy as the property of Findley. Reavis and Thomas thereupon replevied the said property from Pearson, the sheriff, who had the same by virtue of said levy, and Horner having caused himself to be sub-

Reavis v. Horner.

stituted as defendant, in place of the sheriff, judgment was rendered against Reavis and Thomas for a return of the property, or in default thereof, for the recovery of the value, damages, etc. Afterwards Reavis and Thomas offered to return the property to the sheriff, and to Horner, with the exception of a small part of it, which could not be returned, the value of which, however, they tendered, but the defendant refused to receive the property, and Horner afterwards caused an execution to be issued on his judgment in the replevin case to collect the value of the property, damages, etc., from plaintiffs herein. It was to restrain the service of this last execution that this action was brought. The district court dissolved the temporary injunction and dismissed the bill. Plaintiffs appeal.

C. Gillespie and A. R. Scott, for appellants, cited *Wells on Replevin*, secs. 778, 782. *McClellan v. Marshall*, 19 Iowa, 561. *High on Injunctions*, sec. 183. *Frey v. Drahos*, 10 Neb., 594.

J. D. Gilman and G. P. Uhl, for appellees. Tender not good unless made unconditionally. 2 Chitty on Cont., 1191, 1194, *et seq.* *Tompkins v. Batie*, 11 Neb., ante p. 147. *Wells on Replevin*, sec. 420, *et seq.*, and 484, *et seq.* A tender of part only of an entire lot of chattels is not good. 2 Chitty Cont., 1209. *Vance v. Bloomer*, 20 Wend., 200. *Bowker v. Hoyt*, 18 Pick., 555.

LAKE, J.

In its main features this case differs but slightly from that of *Frey v. Drahos*, 10 Neb., 594, in which we held that, under a judgment for the return of personal property replevied from a sheriff, a tender at the place where it was taken, and had remained during the in-

Reavis v. Horner.

terim, was sufficient, and that after a refusal by the officer to receive it, his attempt to enforce the alternative judgment for its value was properly enjoined.

In the replevin case here, the property consisted of two horses, one cow, twenty hogs, one harvester, two corn cultivators, one corn planter, six hundred bushels of corn, and one hundred and eighteen bushels of wheat, which had been seized in execution as the property of one Hiram Findley, to satisfy a judgment against him, in favor of the above named Horner. While held under this execution, and during the pendency of the replevin proceedings, all of the property had remained upon Findley's farm, where it was first seized.

The testimony shows, very conclusively, that within a suitable time after the termination of the replevin suit, which was brought by these appellants, and resulted in a judgment against them, they offered both orally and in writing, to redeliver all of said property, except a small portion which had been lost, or otherwise disposed of, at Findley's farm, where it still was. These offers were made to the sheriff from whom it was replevied, and also to Horner, the judgment creditor, who, as the real party in interest, had been substituted as defendant in the action.

One of the features wherein this case differs from that of *Frey v. Drahos*, *supra*, is, that a portion of the property could not be returned. This consisted of fifty bushels of the corn, sixty-eight bushels of the wheat, and five of the hogs. In lieu of these articles, there was a tender in money, as was claimed, of their value as found by the judgment of the court. And this course is the proper one where the value of replevied articles, so found, is definitely known. *Pickett v. Bridges*, 10 Humph., 171.

As to the missing grain there was no difficulty in

reaching the valuation fixed by the court. The six hundred bushels of corn, in the judgment of the court, is valued at \$90.00, and the one hundred and eighteen bushels of wheat at \$88.50. Of the former, this would make the value per bushel fifteen cents, and of the latter seventy-five cents. And it was upon this basis that the amount of money actually tendered was estimated—it being for the fifty bushels of corn, \$7.50, and for the sixty-eight bushels of wheat, \$51.00. This estimate is made upon the reasonable supposition, in the absence of evidence to the contrary, that in a bin of wheat, or a crib of corn, the value of each bushel is the same.

In the case of the twenty hogs, which the court valued in gross at \$90.00, it is hardly possible for this rule to be applicable. The five that were missing may have been of the very largest and most valuable, or of the most inferior of the lot. It is not likely that they were of an exact average, taken altogether, of the whole number replevied. It seems, however, to have been taken for granted that the court had found the hogs to be of equal value, one with another, and accordingly, in fixing upon the amount to be tendered for missing ones, their value was estimated at \$4.50 each. And it appears from the evidence that this mode of estimate was entirely satisfactory to Horner, the execution creditor, or at any rate he made no objection to the tender on that account. It is further shown by the testimony of several witnesses, Horner himself included, that, in company with the agent of the appellant, he went to Findley's farm where the property was, looked it over, and assisted in making the several measurements and estimates of what remained and of that which was missing, with the view of accepting the tender which Reavis had previously made, and which the agent there renewed; that the only reason

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he then gave for not accepting it and receipting therefor, was that Mrs. Findley claimed all of it but one horse as her own, and forbid him to take it away. And on the witness stand he in effect conceded that, but for this objection of Mrs. Findley, he would have accepted the property according to the terms of the offer. We conclude, therefore, that as the amount tendered in lieu of the five hogs was then satisfactory to Horner, the fact that it may not harmonize precisely with the valuation by the court, must be held to be immaterial.

As for the claim made by Mrs. Findley, that was not a sufficient reason for the refusal of Horner to accept the property. Her claim, whether good or bad, did not concern the appellants. They were not answerable for the goodness of the title except as affected by their own acts. They were only required to return the property in the like condition in which they received it under the order of replevin. It is not pretended that Mrs. Findley's claim was derived from the appellants, or through any act of theirs. They had done nothing in any way prejudicial to the title taken under the execution, nor could they be required to protect it against a claim set up by Mrs. Findley or any one else.

After a careful examination of the case, we are of opinion that the tender made was legally sufficient, and that the appellants were entitled to an injunction as prayed. Judgment will be entered accordingly.

REVERSED AND JUDGMENT.

THE STATE OF NEBRASKA, EX REL. HENRY T. CLARK, v.
THE BOARD OF COMMISSIONERS OF DOUGLAS COUNTY
ET AL.

1. **County Bonds: SALE OF BY COMMISSIONERS: CHANGE OF BID.** The respondents advertised for the sale of county bonds under one of two plans; one plan being for their delivery on the first day of January, 1881, with payment for the whole amount to be then made; the other for their delivery and payment of bid in installments. Among the bids received for the bonds was one by the relator according to the first plan, and one by Ezra Millard according to the second plan. Of these two bids, the commissioners considered that of Millard the best, but they permitted the relator subsequently to modify his bid so as to make it preferable in their estimation to Millard's, and thus changed, formally accepted it. *Held*, That such modification and acceptance were without authority of law, and void.
2. ———. While the commissioners have power to accept or reject such bids, they have no power to permit one to be privately amended so as to make it better than another, or to render it acceptable to them.

ORIGINAL application for mandamus.

George W. Doane, for the relator.

John C. Cowin and *E. Wakeley*, for respondents.

LAKE, J.

The answer to the alternative writ, which is fully supported by the evidence, is, that the respondents having advertised for the sale of the bonds in controversy under one of two plans, viz.: one of the plans being for their delivery on the first day of January, 1881, with payment for the whole amount to be then made; and the other for their delivery and payment of bid in installments of \$25,000 on said first day of January, \$50,000 on the first day of July following, and

The State v. Douglas County.

\$50,000 on the first day of January, 1882, received several bids, among which was one by the relator, and one by Ezra Millard, president of the Omaha National Bank, which last bid was finally accepted.

According to the relator's bid the bonds were all to be delivered and paid for on the first day of January, 1881, at a premium of three and fifty-two-one-hundredths per cent, while according to that of Millard they were deliverable in installments, as above set forth, and to be paid for when delivered, at a premium of one and one-eighth per cent on the first two installments, and one and seven-eighths per cent on the last. The bonds were to bear the same interest under both propositions from the time of delivery.

The commissioners, believing that the bid made by Millard was the best for the county, in view of the interest that would accrue on one hundred thousand dollars of the amount if the bonds should be issued all together in accordance with the relator's bid, while the money derived from their sale would necessarily be lying idle in the treasury, were about to accept it, learning which, the relator, at a private interview, proposed to and did modify his bid by offering in writing to make payment of the one hundred thousand dollars, if the commissioners preferred it, in two certificates of deposit on the First National Bank of Omaha, one for \$52,760, payable July 1st, 1881, and the other for \$54,260, payable January 1st, 1882. By this mode of payment the county would realize the sum of \$7,020 for the use of the money by the bank as an offset to the interest which the bonds would bear.

This modified bid the commissioners considered better than Millard's, and not without some misgivings as to the propriety of so doing, they accepted it, and awarded the bonds accordingly. Shortly afterward, however, becoming satisfied that this action was ille-

gal, they formally vacated it, and awarded the bonds to Millard under his bid.

That the acceptance of the relator's bid was without authority of law, and therefore a void act, would seem to require no argument. This bid was not in conformity with either of the proposals which the commissioners had made for the sale of the bonds. In the notice given to the public of the proposed sale, by which bids had been invited, no mention of certificates of deposit as a medium of payment was made. The sale, under the law by which alone it was authorized, could be made only for money, and the commissioners had no right to consider any bid proposing payment in anything else. Besides, after the bids were submitted and opened, no material change of their terms was permissible. The commissioners were required to act upon them in the condition they then were. They had the power, under the law, to accept or reject a bid, but they had no power to permit its amendment privately so as to make it better than that of another bidder, or to render it acceptable to them.

If Millard's bid, which the commissioners considered the best of those regularly made, was not entirely satisfactory, or if they were desirous of ascertaining whether, by a change in the terms of sale, one materially better for the county could be obtained, the plain and only course open to them was through a new call for bids, under a new public notice of the precise terms on which the sale would be made, so that no one bidder should be given an advantage over any other.

The bid of the relator, and its acceptance by the commissioners, being without authority of law, he is not entitled to the bonds, and the peremptory mandamus is denied, and judgment will be entered accordingly.

WRIT DENIED.

Olmsted v. New England Mortgage Security Co.

WILLIS A. OLMSTED AND MARY E. OLMSTED, PLAINTIFFS
IN ERROR, v. THE NEW ENGLAND MORTGAGE SECURITY
Co., DEFENDANT IN ERROR.

1. **Usury.** Where usury is pleaded the burden of proof is upon the party pleading the same. But when usury in the transaction is proved, the holder of a negotiable instrument based thereon must show that he is a *bona fide* purchaser before maturity to be protected.
2. ———. Where a loan of \$350 was effected by the Corbin Banking Co., and \$100 retained as commissions, *Held*, that the proof showed it to be the agent of the lender, notwithstanding a recital in the application that it was the agent of the borrower.

ERROR to the district court for Butler county. Tried below before Post, J.

Phelps & Thomas, for plaintiff in error, cited 11 Central Law Journal, 203. *Clark v. Sisson*, 22 N. Y., 312. Tyler on Usury, 421. *Philo v. Butterfield*, 3 Neb., 259. *Cheney v. White*, 5 Neb., 261. *Cheney v. Eberhardt*, 8 Neb., 423.

D. G. Hull and E. R. Dean, for appellee, cited *Palmer v. Call*, U. S. Circuit Court of Iowa, Opinion by Judge Love. Tyler on Usury, 103, 156, 172. *Condit v. Baldwin*, 21 N. Y., 219. *Dragnet v. Wigley*, 11 East, 43. *Solastie v. Mellville*, 7 Barn & Cress, 427. *Coster v. Delwink*, 8 Cowen, 299. *Smith v. Marine*, 21 N. Y., 219. *Bell v. Day*, 32 N. Y., 165. *Baxter v. Buck*, 10 Vt., 548. 16 N. J. Eq., 537. 44 Iowa, 32. 45 Iowa, 46, and the result summed up in 17 Albany Law Journal, 119.

MAXWELL, CH. J.

This is an action to foreclose a mortgage on real estate. The defense is usury. The cause was referred to a referee, who found the issues of law and fact in

11	487
13	166
14	93
18	233
24	624
11	487
24	515
11	487
39	385
39	667
11	487
56	482

favor of the defendant in error. A decree being rendered in its favor, the plaintiffs bring the cause into this court by petition in error.

It appears from the testimony that one A. W. Oco-
bock advertised in the newspapers that he was making
loans in Butler and Dodge counties through one C. C.
Cook. That the plaintiff in error, Willis A. Olmsted,
applied to Cook for a loan, and was directed by him
to Ocobock to see if the plaintiff's farm which was
offered as security would be acceptable to the company.
Ocobock sent an agent to examine the farm, who, being
satisfied therewith, presented the following application
for the loan to the plaintiff for his signature:

"Whereas I have this day employed the Corbin
Banking Company to negotiate for me a loan of \$400,
for the term of five years, with interest at the rate of
ten per cent per annum, upon a note and mortgage
securing the same, which shall be a first lien upon my
farm in Butler county, Nebraska. Now then if they
shall succeed in negotiating said loan within thirty
days, upon the usual conditions exacted by eastern
money-lenders as to security, perfecting of title, insur-
ance, etc., I agree to pay the said Corbin Banking
Company the sum of \$80, which shall be in full of their
commissions and the commissions of those whom they
employ to assist them in making said negotiations.

"WILLIS A. OLMSTED.

"DAVID CITY, NEB., Feb. 24, 1876."

The above was on a printed form, leaving only the
amount, time, county, state, and name of the applicant
to be filled out. This was accompanied by a printed
form containing a minute description of the farm,
which concluded as follows:

"The statements made in the above application and
the supplement made herewith to the Corbin Banking
Company are true, and are made by me to be used by

Olmsted v. New England Mortgage Security Co.

said company as my agent in procuring me the above loan.

“WILLIS A. OLMSTED, Applicant.

“Dated DAVID CITY, NEB., Feb. 24, 1876.”

Upon this application a loan of \$350 was effected, a promissory note, of which the following is a copy, being executed by Olmsted:

“\$350.00 SUMMIT P. O., March 27, 1876.

“Value received, on the twentieth day of March, 1881, I promise to pay The New England Mortgage Security Company or order three hundred and fifty dollars, with interest from date until paid, at ten per cent per annum as per coupons attached, at the office of the Corbin Banking Company, 61 Broadway, New York City. Unpaid interest shall bear interest at ten per cent per annum. On failure to pay interest within five days after due, the holder may collect the principal and interest at once.

“WILLIS A. OLMSTED.”

This note had coupons attached, and was secured by mortgage to “The New England Mortgage Security Company,” the interest being made payable at the office of the “Corbin Banking Company, New York City,” on the first day of April of each year. Upon the execution of the note and mortgage, Olmsted was paid \$250. In the spring of 1878 he received from Ocobock the following:

“W. A. OLMSTED, Summit:

“Dear Sir—Your interest amounting to \$35 will be due at the office of The Corbin Banking Company; 61 Broadway, New York City, April 1, 1878.

“It is important that you should make prompt payment, as you will see by enclosed circular.

“Respectfully Yours,

“A. W. OCOCK.

“Are your taxes paid?”

This letter is on the same sheet with the circular referred to, and is printed, except the names of Olmsted and Ocobock, and there is printed in red ink across the face of the same the following:

"If the amount is sent to me to forward, an additional charge of fifteen cents is made to cover exchange.

"A. W. OCOBOCK."

The circular referred to is as follows:

"THE CORBIN BANKING Co.

"NEW YORK.

"Dear Sir—Please say to parties having interest payable at this office on a day certain, that their money is due here *on that day*, and to save costs must *be* here.

"When not paid *promptly* we shall return to the owners, and they will send to an attorney for foreclosure. The five and thirty days' delay named in notes relates to the right to collect the principal sum, and does not prevent a foreclosure for non-payment of interest. As soon as a bill is filed the attorney's fees accrue, and when debtors will not take care of their interest at maturity they cannot complain if a suit and heavy costs follow.

"Respectfully Yours,

"A. CORBIN, President."

Two other circulars of similar import from the Corbin Banking Co. were introduced in evidence. All the business both before and after the making of the loan appears to have been done by the Corbin Company. To show that the Corbin Banking Co. was not the agent of the defendant in negotiating the loan, the defendant introduced the deposition of Henry Saltonstall, who testified that he was president of the defendant, and that on or about the 27th day of March, 1876, the treasurer of the Corbin Banking Company offered him this loan, which after examination he agreed to buy, and on or about the 12th day of April of that year,

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paid for the same the sum of \$350.00. He also testified that the defendant had no "agent or brokers at any place or places who act for said company in placing loans of money for it." Also that defendant had received no rebate, commission, or fee, nor had he any knowledge of "any commission, or fee of any kind paid or agreed to be paid."

The question to be determined is, whose agent was the Corbin Banking Company in negotiating this loan? If it was the agent of the Olmsteds, they are not entitled to relief from the rapacity of their own employee; in other words, if the Banking Co. acted only as the agent of the borrower, who entered into a contract with it to pay it a stipulated price for obtaining the loan, and the defendant in good faith loaned its money for a lawful rate of interest, it will not be affected by the vice of usury, however glaring it may be, as the law in such case will not permit a party to sustain loss who has not, by himself or his agent, loaned money at usurious rates. *Philo v. Butterfield*, 3 Neb., 259. But on the other hand, if a person places money under the control of another to loan for him, and the agent charges the borrower unlawful interest, or receives a bonus from him for such loan, either with or without the knowledge of the principal, he is affected by the act of his agent. The reason is, the principal has entrusted the business of making loans to him and has placed the money in his hands for that purpose, and in transacting the business by agency, there cannot be a distinct agreement between the lender through his agent with the borrower, and a different one between the agent and borrower, as it is in consideration of the loan that the unlawful interest or bonus is paid. The whole transaction is but *one* contract, which being made by his agent, the lender is bound by it. *Id.*

In the case at bar, Mr. Saltonstall, while making

explicit denials and statements as to matters not material to the issue, fails to deny specifically that the Corbin Banking Company was the agent of the defendant. There was no cross-examination, and the questions, whether intentionally or not, are so framed as to admit of general answers. A party pleading usury takes the laboring oar and must establish its existence. But when it is proved, the holder of the paper must show that he is a bona fide purchaser thereof before maturity. The burden of proof as to the good faith of the transaction devolves upon him. *Wortendyke v. Meehan*, 9 Neb., 228-9, and cases cited. The pretended sale of the note and mortgage on the 27th day March, before they were executed, was evidently a mere device to avoid the usury laws. The mere statement in a printed form furnished by the Corbin Banking Co., that the borrower employed it as his agent to negotiate the loan, does not of itself conclude the parties, nor more than *prima facie* establish such agency. In fact, in most cases it is ground of suspicion, as showing on the face of the application an attempt to evade the law. But the court will look at the entire transaction to determine the question of agency.

In the case of *Cheney v. Woodruff*, 6 Neb., 151, the agent making the loan testified that in making the loan he acted as the *agent of the borrower*, but as soon as the loan was effected he acted as the agent of the *lender*. The facts in this case are very similar to those upon which that case was decided. Here the banking company effected the loan, took the notes and mortgage in favor of the defendant, and continued its agent in this transaction until the commencement of this action. They seem to be acting together, at least so far as this case is concerned, the defendant in the role of innocent purchaser, and the Banking Co. as agent of the borrower; but the proof fails to establish

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either relation. The Banking Company was clearly the agent of the defendant, and it must take the consequences of its agent's acts in making the loan. The finding of the referee that this was a Nebraska contract and not governed by the laws of New York, is correct, but the defendant in error is merely entitled to the principal without interest, less the payments heretofore made, and the plaintiffs in error are entitled to costs in both courts. *Philo v. Butterfield, supra*. *Cheney v. White*, 5 Neb., 256. *Cheney v. Woodruff*, 6 Id., 185. The decree of the district court is modified in conformity to this opinion.

DECREE ACCORDINGLY.

JOHN P. BECKER AND OTHERS, APPELLANTS, V. LAFAYETTE ANDERSON, APPELLEE.

Chattel Mortgage. Where the statute provides that a chattel mortgage shall be void "as against the creditors of the mortgagee" unless the mortgage or a true copy thereof shall be filed and recorded as directed by law, and the mortgagor dies in possession of the property, leaving an insolvent estate, *Held*, 1. That under the law in force in 1875, a chattel mortgage must be acknowledged to entitle it to be recorded. 2. That the mortgage being void as to creditors, the mortgaged property became assets in the hands of the executor for the payment of debts of the estate.

APPEAL from the district court of Platte county. Tried below before Post, J.

A. C. Turner and Byron Millett, for appellants, cited *Hooker v. Hammill*, 7 Neb., 231. Gen. Stat., sec. 17, 875. *Irwin v. Welch*, 10 Neb., 479. *Kilbourn v. Fay*, 29 Ohio State, 264. Bump on Fraud, 2d Ed., 514. *Blakeslee*

11	498
18	264
18	340
11	498
31	456
11	493
49	172
49	160

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v. Rossman, 43 Wis., 116. *Robbins v. Parker*, 3 Met., 117. *Russell v. Winne*, 37 N. Y., 591.

Whitmoyer & Gerrard and E. Wakeley, for appellee, cited *Alvis v. Morrisen*, 63 Ill., 181. *Schroder v. Keller*, 84 Ill., 46. *Shaller v. Brand*, 6 Binney, 438. *Merriam v. Harsen*, 2 Barb. Ch., 232. *Seal v. Duffy*, 4 Penn. State, 274. *Williams on Executors*, 1679. *Herman, Chattel Mortgages*, 154.

MAXWELL, CH. J.

This is an action by two creditors of the estate of Lester C. Platt, to cancel a chattel mortgage alleged to have been executed by him in favor of the defendant. It appears from the record, that on the 18th of September, 1875, Platt, being very sick, executed what purports to be a mortgage of all his "personal property, consisting of nine mules, three horses, fifteen colts and ponies, eight oxen, five cows, twenty-five head of young cattle, twenty-five sheep, six swine, seven wagons, ten plows, two mowing machines, one seeder, one corn planter, two horse hoes, one fanning mill, eight sets harness, all crops on the land and grain raised in the year 1875, one undivided half of all buffalo robes, and stock of goods in store and other goods," and delivered the same to the defendant to secure the sum of \$2,208.00. This was a bona fide debt contracted about a year before the execution of the mortgage. The plaintiff's claims also are bona fide, and so far as appears, no reason exists why the claim of the defendant should be preferred over theirs. Platt had a farm and kept a store near the Pawnee reservation, and the defendant seems to have been engaged with him as a partner in the purchase of buffalo robes and perhaps in other ventures. At the time of the execution of this

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instrument, Platt was indebted in a very large amount to various parties, of which the defendant had full knowledge. He was also indebted to his wife for money belonging to her separate estate, which he had borrowed from her. An attempt seems to have been made to secure this debt by a mortgage on the farm, which, upon the estate proving insolvent, seems to have been abandoned, although the claim appears to have been valid. On the 16th day of September, 1875, Platt made a will, in which Elvira G. Platt, Lafayette Anderson, and others, were appointed executors. Platt died on the 24th of September, 1875, and the will was duly admitted to probate on the 28th of October of that year, and Elvira G. Platt and the defendant are the executors of the same. The mortgage in controversy was filed for record on the 18th day of September, 1875, but the mortgagee did not take possession of the goods, claiming as mortgagee, until January, 1876. A portion of the mortgaged goods was exchanged for others, and the store seems to have been kept open and goods sold the same after as before the execution of the mortgage. There probably was no intention on the part of the defendant to actually defraud the creditors of the estate, but there seems to have been an indifference on his part to their claims in striking contrast to his anxiety to secure his own. So far as the record discloses, the defendant has no superior equity over other creditors of the estate, and must rely on his naked legal rights.

Section 73 of Chap. 43 of the Revised Statutes of 1866, which was in force at the time the mortgage in question was executed, was as follows: "Every mortgage, or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession

of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers in good faith, unless the mortgage or a true copy thereof shall be filed *and recorded* as directed by law."

Section 16 provides that "all deeds, mortgages, and other instruments which are required to be recorded, shall take effect and be in force from and after delivering the same to the clerk for record and not before, as to all creditors and subsequent purchasers in good faith without notice."

Section 17 provides that "they shall not be deemed lawfully recorded unless the same shall have been previously acknowledged or proved in the manner prescribed."

Section 2 provides that "the grantor must acknowledge the instrument to be his voluntary act and deed."

Our present statute requires a chattel mortgage to be filed but not recorded, and provides that no acknowledgment thereof is necessary. Laws of 1879, 108. But under the provisions of the law in force in 1875, a chattel mortgage, to be effectual as against creditors and subsequent purchasers in good faith, was required to be filed *and recorded*. To entitle it to be recorded it must have been previously acknowledged. *Hooker v. Hammill*, 7 Neb., 231. A mortgage is good between the parties without recording, and if the mortgagee take possession of the goods under his mortgage it is notice to all of his claim of ownership, although subject to attack for fraud. But when the mortgagor retains possession the statute prescribes the conditions upon which the mortgagee will be protected, viz.: by filing and recording his mortgage. This is made equivalent to a change of the possession.

The certificate of acknowledgment is as follows:

"STATE OF NEBRASKA, } ss.
 "County of Platte. }

"This mortgage was acknowledged before me by Lester W. Platt, this eighteenth day of September, A.D. one thousand eight hundred and seventy-five.

"H. C. MAGOON, J. P."

The function of an acknowledgment is two-fold: *First*, To authorize the instrument to be given in evidence without further proof of its execution. *Second*, To entitle it to be recorded. Courts construe acknowledgments liberally to prevent a failure of justice, and they will be held sufficient when there has been a substantial compliance with the statute, although they fail to follow the precise words or form prescribed. But it must appear that the person executing the instrument did so voluntarily. And particularly should this be required in a case like the one at bar, where the mortgage was written by the mortgagee, the mortgagor being very sick and perhaps scarcely in a condition to overcome importunities to execute the same. But however this may be, there is nothing in the certificate from which it appears that the execution of the instrument was voluntary on the part of Platt. The acknowledgment therefore is a nullity, and the mortgage was not entitled to record. The case, therefore, rests upon the same ground as an unrecorded mortgage at the time of the death of the mortgagor, the mortgagee not being in possession of the mortgaged property, and the estate being insolvent.

Section 73 of Chapter 43, heretofore referred to, declares that a mortgage not filed and recorded as directed by law "shall be absolutely void as against the creditors of the mortgagor."

The statute does not declare a mortgage void as against the mortgagor or his heir or legatee. As to them it may be valid. The question presented there-

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fore is, is a chattel mortgage which has not been filed and recorded as directed by law, where the possession of the mortgaged property passes directly from the deceased mortgagor to the personal representative, valid as against the executor of an insolvent estate? It is unnecessary to cite authorities to show that the personal estate of a deceased person passes to the executor. The statute prescribes the executor's duties, the mode of proving claims against the estate, and the order in which debts are to be paid. Where the estate is solvent the heir has a beneficiary interest in the trust as distributee. But if the estate is insolvent his interest is technical merely, and the executor becomes a trustee for the creditors of the estate, and in that capacity is bound to protect their interests. And where goods come into his hands as executor he cannot be permitted to claim the same as mortgagee under a mortgage which, at the time of the decease of the mortgagor, was void as to creditors, the estate being insolvent.

In the case of *Kilbourn v. Keller*, 29 Ohio State, 264, the court held that where a chattel mortgage is declared void by the statute "as against the creditors of the mortgagor," and the mortgagor dies in possession of the mortgaged property, leaving an insolvent estate, such property becomes assets in the hands of the executor or administrator of the mortgagor. In that case the mortgage seems to have been in proper form, but was not filed, and it was held void as to creditors. In our opinion the mortgage in this case is absolutely void as against the creditors of the estate.

The judgment must therefore be reversed, and the cause remanded to the court below with directions to enter judgment subjecting the proceeds of the mortgaged property to the payment of the plaintiff's claims.

JUDGMENT ACCORDINGLY.

Jordan v. Hamilton County Bank.

GEORGE W. JORDAN, PLAINTIFF IN ERROR, V. THE HAMILTON COUNTY BANK, DEFENDANT IN ERROR.

1. **Chattel Mortgage.** If a chattel mortgage be duly filed in the office of the county clerk, as required by sec. 73, ch. 43, of the Revised Statutes of 1866 (Gen. Stat., sec. 14, ch. 25), as amended by the act of Feb. 15th, 1877, the mere failure of the clerk to properly index the same, as required by the next section, will not render it void as to a subsequent mortgagee without actual notice of its existence.
2. ———: **DESCRIPTION OF PROPERTY.** Description of property examined and held to be sufficiently definite.
3. ———: **SENIOR AND JUNIOR MORTGAGEES: FRAUDULENT RELEASE BY THE FORMER.** Where a senior mortgagee of chattels, for the purpose of depriving of his security a junior mortgagee of a part of the same property, fraudulently releases that portion on which his mortgage is the exclusive lien, the same being adequate security, he will not be permitted, to the prejudice of the latter, to go upon the property covered by the second mortgage for payment of his demand.

ERROR to the district court for Hamilton county. Tried below before Post, J. Action of replevin by Hamilton County Bank against George W. Jordan to recover property on which it claimed title by virtue of a chattel mortgage from Rule and others. Defense: title by prior mortgage on same property. Judgment below for plaintiff, to reverse which Jordan, the defendant, brought the cause here.

Agee & Hellings, for plaintiff in error. Jordan having prior lien, the only right of the Bank was to redeem. *Miller v. Finn*, 1 Neb., 301. *Renard v. Brown*, 7 Id., 454. Bank should have notified senior incumbrancer not to release, should have tendered the amount due, taken an assignment of the mortgage, and been subrogated to rights of senior incumbrancer. *Herman on Chattel Mortgages*, 147. The most favorable decision for defendant in error upon this subject is to the effect

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11	499
31	208
11	499
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that if a mortgagee, with notice of the equities of a junior incumbrancer, releases a portion of the property, to the prejudice of the junior incumbrancer, his claim in equity will be reduced in the same proportion that the property released bore to the entire security in point of value. *McIlvain v. Insurance Co.*, vol 9 "The Reporter," 760. *Cheesborough v. Milford*, 7 American Dec., 497, and cases there cited.

E. J. Hainer and *A. J. Rittenhouse*, for defendant in error. Indexing is essential to validity of mortgage. *Herman on Chattel Mortgages*, 367, 369, 374. *Metz v. State Bank*, 7 Neb., 165. *Hagenbuck v. Reed*, 3 Neb., 17. *Dwarris on Stat.*, 110, 114. *Barney v. McCarty*, 15 Iowa, 510. The description is too vague to hold the property in question. *Golden v. Cockrill*, 1 Kans., 259. *Savings Bank v. Sargent*, 20 Kans., 576. *McCord v. Cooper*, 30 Ind., 9. *Montgomery v. Wright*, 8 Mich., 146. *Herman on Chattel Mortgages*, pp. 82, 83. *Jordan* having diminished the security of defendant in error without its consent, by releasing a portion of the same to which it had recourse, the property so held by defendant in error is discharged from the lien of *Jordan*. *Coyle v. Davis*, 20 Wis., 564. *Herman on Chattel Mortgages*, 365. A prior mortgagee, who knows that a part of the mortgaged property has been subsequently conveyed or encumbered by the mortgagor, will not be permitted to deal with him arbitrarily to the prejudice of the interests of such subsequent mortgages or purchasers by releasing that part of the property on which he has the only lien, and attempting to enforce his claim out of those portions in which such others had become interested. *Deuster v. McComus*, 14 Wis., 307. *Stevens v. Cooper*, 1 Johns. Ch., 425. *Guion v. Knapp*, 6 Paige, 35. *Patty v. Pease et al.*, 8 Paige, 277. *Parkham v. Welch*, 19 Pick., 231.

LAKE, J.

Three questions are brought to our notice and discussed by counsel for plaintiff in error in their brief, and on which they contend the court below erred in its ruling. The *first* of these questions is whether the mere failure of the county clerk to properly index the chattel mortgage under which the plaintiff in error claimed the property, rendered it ineffectual as to a subsequent mortgagee, which the defendant in error was, in good faith, and without actual notice of its existence. We answer this question in the negative, for the following reasons:

Sec. 73 of ch. 43 of the Rev. Statutes, 1866, as amended by the act of Feb. 15th, 1877, provides that: "Every mortgage, or conveyance intended to operate as a mortgage of goods and chattels, hereafter made, which shall not be accompanied by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed in the office of the county clerk of the county where the mortgagor executing the same resides * * * * and such clerk shall endorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons, and such mortgage or instrument so filed shall be as valid as if the same were fully spread at large upon the records of the county." Laws 1877, 51. The plain import of this language is, that if the instrument be filed by the county clerk of the proper county, and kept in his office for inspection by interested parties, nothing more is wanting to hold the property as against subsequent purchasers or mortgagees.

Having thus declared what is necessary to be done to make the instrument valid as against "subsequent purchasers and mortgagees in good faith," the next section, as amended at the same time, provides that: "Such clerk shall also enter in a book to be provided by him for that purpose, the names of all parties to such instruments, arranging the names of mortgagors alphabetically, and shall note thereon the time of filing such instrument or copy." As we understand it, the only purpose of the legislature in making the requirement of this section was to furnish a convenient mode of ascertaining whether any particular person has incumbered his chattels, without the necessity of examining all of the instruments that may happen to be on file in the office at the time. We are of opinion that by no proper construction of this statute can the duty enjoined upon the clerk by this section have any relation to the validity of the mortgage, which, by the preceding section, is made to depend solely upon its being properly filed. Until its validity is fixed, by being filed, the clerk cannot do what is required of him by the latter section. The duty of arranging the names of the mortgagors, as here directed, is an important one. It is, however, a duty which the clerk owes to the public, rather than to the mortgagees of instruments deposited in his office, and if any one of the public suffer through its non-performance, he must look to the clerk alone for redress.

The case of *Metz v. The State Bank*, 7 Neb., 165, cited by counsel for the defendant in error in support of their view that the indexing was essential to the validity of the mortgage, is not applicable. That was a case where a judgment creditor sought to make his judgment, rendered by a probate court, a lien upon the debtor's real estate within the county, and while it is true that we there held that indexing the names of the parties to

Jordan v. Hamilton County Bank.

the judgment was an essential requisite to the perfection of the lien, the decision was upon a statute very different from the one we are now considering. In addition to requiring the filing of the transcript of judgment from the probate court, "in the office of the clerk of the district court," that statute declared expressly that, "when such transcript is so filed *and entered upon the judgment record*, such judgment shall be a lien upon real estate in the county where the same is filed; and when the same is so filed *and entered upon such judgment book*, the clerk of such court may issue execution thereupon in like manner as execution is issued upon judgments rendered in the district court." And that statute further provided that the "judgment record" should "contain the judgment debtor and the judgment creditor arranged alphabetically," etc. Under such provisions of statute, we necessarily held that indexing the parties to the judgment was requisite to the perfection of the lien.

The *second* question is, whether the property mentioned in the mortgage was described with requisite certainty. The description was as follows, viz.: "Two mules, one bay and one brown, aged eight years old. One mare, bay, eight years old. One bay horse, age five years old. One black mare, age five years old. One lumber wagon. One double harness. Nine acres of growing wheat, situated on south-west quarter of sec. 35, town 12, range 6." It is contended by counsel for the defendant in error that this description is void for uncertainty. We think otherwise. The color and ages of all the animals are definitely given. The wagon is described as a "lumber" one, a term generally applied to an ordinary double wagon used by farmers. The harness as a "double" one, that is, designed for a team of two animals. The nine acres of wheat was then growing. According to the mortgage, this prop-

erty was all then upon a certain tract of land described by government subdivision, in Hamilton county, Nebraska, and we think that a person of average intelligence would have had no serious difficulty in finding and pointing it out, if there. Besides, if necessary, in order to distinguish any portion of it from other property of like description on the land, parol evidence was admissible for that purpose. *Bell v. Prewitt*, 62 Ill., 361.

The *third* question is, whether the release of a portion of property covered by his mortgage, by the plaintiff in error, worked a postponement of his lien to that of the defendant in error. The plaintiff's mortgage was executed on the twenty-first of April, 1879, to secure the payment of three promissory notes of that date, one for one hundred and fifty dollars, payable Nov. 1st, 1879, one for one hundred dollars, payable at the same time, and one for fifty dollars, payable Nov. 1st, 1880, with interest. The mortgage held by the Bank was given on the twenty-second of October, 1875, to secure the payment of a promissory note bearing date of the eighth of that month, and calling for the payment of one hundred and twenty-five dollars in one year, with interest. This mortgage was upon a span of mules, harness, and wagon, a part of the property covered by the first mortgage.

Occupying this relation to the property, and to each other, it was the right of the holder of the junior mortgage to redeem and have an assignment of the senior incumbrance. *Renard v. Brown*, 7 Neb., 449. Or, but for the release of said property not covered by the second mortgage, the first mortgagees might have been compelled first to look to that for payment. 1 Story's Eq. Jurisprudence, sec. 633. *High v. Brown*, 46 Ia., 259. The testimony very clearly shows that this course would have resulted in the satisfaction of both debts, and without the least prejudice to the senior mortgagees.

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It is undisputed—in fact it is conceded—that the defendant in error had no knowledge of the existence of the first mortgage until after foreclosure proceedings were commenced upon it, at which time the release had already been given. Jordan himself testified that he gave the release on the 20th of December, 1879, the very day he commenced to foreclose as to the property covered by the second mortgage; and the cashier of the bank, Wildish, testified that the first he heard of the mortgage to Jordan and others was on the 29th of that month. And this release was, very evidently, fraudulently given. The reasons given by Jordan for making it, at the time he did, and upon that particular property, are far from satisfactory, and lead irresistibly to the conclusion drawn probably by the court below, that it was to deprive the bank of its security. Under the evidence, we think the court was justified in finding that the first mortgage covered property of sufficient value, independently of that included in the second mortgage, to have fully satisfied the amount secured. This being so, it would have been inequitable to permit a satisfaction of the former, after such release, out of the property covered by the latter.

In *Guion v. Knapp*, 6 Paige, 35, it was held that where a mortgagee, with notice of successive alienations of parts of the mortgaged property, released that part which was primarily liable, in equity, for the payment of the mortgage debt, he should not be permitted to charge other portions with the payment of the mortgage, without deducting from the amount due the value of the part thus released.

After a careful perusal of the evidence, and an examination of authorities cited, we are of opinion that the judgment of the court on the issue joined was right, and it is affirmed.

JUDGMENT AFFIRMED.

ISRAEL CANNON, APPELLEE, v. ALF CANFIELD, APPELLANT.

Promissory Note: CONSIDERATION. The mere fact that one purchases a negotiable promissory note before maturity, for about one-half the face value, there being evidence tending to show that he did not regard the note as good (collectible), and no evidence showing it to be worth more, is not sufficient to put the purchaser on inquiry as to the consideration.

APPEAL from Johnson county. Tried below before WEAVER, J.

T. Appelget & Son, for appellants. If the note is regular commercial negotiable paper, fraudulent representations made to obtain it will not vitiate in the hands of a *bona fide* purchaser before due for *value*. Edwards on promissory notes, p. 325. *Davis v. Bartlett et al.*, 12 Ohio State, 537. *Wortendyke v Meehan*, 9 Neb., 229. If the transferrer of negotiable paper before due show that he paid *value* for it, the burden of proof is on the party seeking to defeat its collection, to show that he—the transferee—knew that the note was illegally obtained from the maker. *Id.* The fact that the defendant purchased the note for less than its face, is no ground for suspicion. *Bailey v. Smith*, 14 Ohio State, 396. All that is necessary is that the defendant should have paid all that the note, under all the circumstances, was reasonably worth. *Id.*

Davidson & Easterday and *V. D. Metcalfe*, for appellee, cited *Paton v. Coit*, 5 Mich., 510. *Wortengdyke v. Meehan*, 9 Neb., 229. Bateman on Common Law, *seca* 296, 334.

MAXWELL, CH. J.

This is an action enjoining the defendant from transferring a certain promissory note executed by the plain-

Cannon v. Canfield.

tiff, and to have the same delivered up and cancelled. A decree was rendered in favor of the plaintiff in the court below. The defendant appeals to this court. The note is as follows:

“\$100.00.

“TECUMSEH, Johnson County, Nov. 6th, 1879.

“One year after date I promise to pay the treasurer of the Nebraska Iron Fence Co. of Nebraska City, Nebraska, or bearer, the sum of one hundred dollars, at State Bank of Nebraska, Seward, Nebraska, value received, with interest at ten per cent per annum from date. Reasonable attorney fee if suit be instituted on this note.

“ISRAEL CANNON.”

“P. O. ———. The maker of this note lives on No. —, sec. 31, tp. 6, r. 12, name by agent I. Cannon; residence 9 miles from Tecumseh, north-east.”

The note was given for a share in stock, of which the following is a copy:

“No. 328. Authorized Capital (shares \$100 each. Full paid up stock \$100), \$1,000,000.

“State of Nebraska,—Otoe County.

“This is to certify that I. Cannon is entitled to one share of one hundred dollars each, of the capital stock of the NEBRASKA IRON FENCE COMPANY, incorporated under the laws of the State of Nebraska, and transferable only on the books of the company on surrender of this certificate properly endorsed. Persons purchasing stock in this company please notify the secretary at once.

“W. B. PERSHING, Secretary.

“NEBRASKA CITY, Nebraska, Nov. 6th, 1879.”

On the back of the certificate is the following:

“This certificate of stock entitles the holder thereof to all the iron fence at wholesale prices that he may need for his own use, and that is manufactured and

kept for sale by the company, and to receive all dividends that may be declared in posts or wire at whole-sale prices of same when posts and wire are ordered together for the first year, or until the company shall find that cash dividends may be declared.

"NEBRASKA IRON FENCE COMPANY."

On a blank appointment of the plaintiff as agent of the Nebraska Iron Fence Company, is the following:

"TECUMSEH, Nov. 6, 1879. It is hereby agreed between the Neb. Iron Fence Co. and I. Cannon, that if after reasonable time, said I. Cannon does not sell enough certificates and iron fence to the amount of \$100.00, after using due diligence, then the Neb. Iron Fence Co. upon the receipt of I. Cannon's papers, will return him his.

"C. N. RAND, Gen. Agt."

The note in question was made and delivered to Rand, and by him on the same day sold and delivered to the defendant, who claims to be a *bona fide* purchaser without notice.

There is testimony tending to show that no such corporation as the Nebraska Iron Fence Company ever existed at Nebraska City, that the stock is worthless, and that the plaintiff has received no consideration for the note. But these facts do not seem to have been known even by the plaintiff himself at the time the defendant purchased the note.

The plaintiff testified on rebuttal, as follows:

Q. How soon did you have a conversation with the defendant after you signed this note?

A. Well, sir, I cannot exactly tell the date.

Q. About how long?

A. It did not seem to me it was but a very few days. I don't think it could have been over a week.

Q. Is it your judgment that it was less than a week?

A. It did not seem to be over four days, because I had iron fence on the brain about that time.

This conversation took place after the defendant had purchased the note, and even if the defendant had then been notified of the want of consideration would not have been available against a *bona fide* purchaser. But the testimony tends to show that at that time the plaintiff regarded the consideration as entirely satisfactory.

It is claimed that the price paid by the defendant for the note in question being much below the face value thereof was sufficient to put him on inquiry as to the consideration. The amount paid for a promissory note may become a material inquiry in determining whether a purchaser obtained the same in good faith or not. As should a collectible promissory note for \$100.00 be offered for \$25.00 or \$50.00, or any sum entirely disproportionate to its value, it is a circumstance and in certain cases may be sufficient to arouse suspicion and put the purchaser on inquiry.

The testimony shows that the price paid by the defendant for the note in controversy was about the sum of \$50.00. This of itself might be ground of suspicion. But the defendant testifies that he did not regard the note as good (collectible), and for that reason he did not want to purchase it, and there is no testimony tending to show that the plaintiff was able to pay his debts. For aught that appears the defendant may have paid more for the note than can be collected thereon. It is evident that the plaintiff was induced to give the note in question through false representations made by Rand, who claimed to be the agent of the Nebraska Iron Fence Co., and there seems to be good cause to indict Rand under the statute against obtaining property by false pretenses. But the testimony shows that the defendant purchased

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the note in controversy before maturity for a fair value, and without notice of any defense to the same.

The injunction is therefore dissolved, and the action dismissed.

JUDGMENT ACCORDINGLY.

11	510
16	201

11	510
59	428

GEORGE W. COVELL AND FRANK RANSOM, APPELLEES,
v. JAMES G. YOUNG, APPELLANT.

1. **Taxes: CONSTITUTIONAL LAW.** Where a road tax levied in 1876 without regard to valuation, at the rate of four dollars per quarter section was added to taxes for which lands were sold, *held*, That said tax, being illegal, avoided the tax deed.
2. ———: **ILLEGAL SALE: OWNER NOT LIABLE FOR EXPENSES.** Where a sale of land for taxes is illegal, the owner of the land is not liable for the expenses incurred by the tax purchaser in serving notice on occupants or owners of the land of his intention to obtain a deed, nor for the expenses of procuring the deed.

APPEAL from Otoe county. Tried below before POUND, J.

John C. Watson, for appellant.

Covell & Ransom, for appellees.

MAXWELL, CH. J.

This is an action to set aside a tax deed upon the ground that the taxes for which the land was sold were illegal and void. The defenses relied on are:

First. That the tax deed is valid on its face.

Second. That the objections to the deed are not those specified in section 130 of the revenue law of

1879, and that the irregularities complained of are cured by section 140 of said act.

Third. That the plaintiffs have failed to show title to the lands in controversy.

A decree was rendered in the court below in favor of the plaintiffs. The defendant appeals to this court.

No question is made as to the form of the deed. The question involved in the second grounds of objection were before this court in the case of *McCann v. Merriam*, ante p. 241, S. C. 9, N. W. Rep., 96, and it was held that where a sale of land for the taxes of 1876 was made in March, 1878, the tax deed being made in March, 1880, that the validity of the sale and force of the tax deed were to be tested by the law in force when the sale was made, and that including a void tax in the amount for which the land was sold was sufficient to avoid the deed. And we adhere to that decision.

The land in controversy was sold on the 7th day of November, 1877, for the taxes due thereon for the year 1876, and the validity of the deed must be determined by the law in force in 1877.

In the case at bar a land road tax was levied without regard to valuation, at the rate of four dollars per quarter section upon the land in controversy. Such tax is unauthorized and void under our present constitution, which provides for levying a tax by valuation. Sec. 1, Art. IX, Const. *Dundy v. Richardson Co.*, 8 Neb., 508. *McCann v. Merriam*, ante p. 241. The sale of the land for taxes, as it included an illegal tax was void, and the tax deed being based thereon is invalid and must be set aside.

The objection that the plaintiffs are not the owners of the land in controversy is untenable. It appears from the record that on the 23d day of July, 1860, Wm. E. Pardee, master in chancery of the district court

of Otoe county, as such master executed a deed for the premises in question to Win. H. Broadhead, who had purchased the premises at the sale under a decree of foreclosure in an action in said court, wherein Broadhead was plaintiff and Harman S. Hall and Lydia A. Hall were defendants. That on the 8th day of September, 1860, Broadhead conveyed to Helen S. Pardee, the wife of W. E. Pardee, the master, who made the conveyance to Broadhead. It is claimed that this deed is void because made in contravention of law. An officer selling property under execution or order of sale, is absolutely prohibited from purchasing any of the property offered at such sale. And a purchase so made by him would be void. But here the purchase was made by the mortgagee, and so far as appears was made in good faith, and he being the owner of the fee could convey to whom he pleased. The plaintiffs show a complete chain of title from Mrs. Pardee to themselves, and are clearly entitled to redeem.

It is objected that the costs of the notice to the occupant and land owner of the intention of the defendant to apply for a deed and the costs of the deed were taxed to the defendant; in this there was no error. If the sale was illegal, the owner of the land is not liable for the expenses of such unauthorized sale. A tax purchaser in taking a tax deed acts at his peril, and if he obtains no title by his deed he must pay the costs incurred in obtaining the same. There is no error in the record, and the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

GEORGE McCULLEY AND EMILY McCULLEY, APPELLEES,
V. CLAUDIUS JONES, APPELLANT.

Evidence examined and held sufficient to sustain finding and judgment.

APPEAL by defendant from a decree of the district court for Butler county. Tried below before Post, J.

George W. Lowley, for appellant.

E. R. Dean, for appellees.

COBB, J.

This cause was tried in the district court before the judge without a jury. The findings and judgment of the court were for the plaintiffs. The defendant brings the cause to this court by appeal.

The question upon which the case turns, is: Did the defendant obtain the deed of conveyance for the land in question by duress and fraud, or either of them? The district court found this question in the affirmative, and it devolves upon this court to say whether such finding is sustained by the evidence given in the case. The testimony is conflicting. The plaintiff, George McCully, testifies in substance that he went to Seward in October to settle up with defendant; "I wanted to sell him the land and square up with him. He claimed that I owed him \$750. * * * He wanted to know what I wanted for the land. I told him I wanted \$1000 for it. He studied a while and said he would give me \$600. He finally got to \$650, but I told him I wouldn't take that; he said to let it go, it was some time before it was due and may be we could fix it up. A day or two after I got home he sent

up papers saying I had agreed to make a deed to the land for \$650. I told the man who brought them I wouldn't make it. Then on the 8d of December he sent Mr. Osborne up and arrested me, charging me with obtaining money under false pretenses, and took me to Seward. I took two men with me to go on my bond. It was at the time court was in session here. They refused to take the men I took along. They then proposed if I would give a deed for \$650, they would release me on my own bond, and I did so."

Q. At the time you made this deed, where were you?

A. In Norval Bros. office at Seward.

Q. Were you at liberty?

A. I was in custody.

Q. Custody of whom?

A. Mr. Neighart.

Q. What was his position?

A. Sheriff * * *

Q. What was your purpose in making that deed; what did you make it for?

A. To be released.

Q. At the time you made the deed what do you say the consideration was as stated?

A. Six hundred and fifty dollars.

Q. What did he give you for that?

A. He gave me this \$585 note and a credit on the \$224 note.

Q. If you had not been under arrest—had you been at liberty—would you have made the deed?

A. I would not.

The witness was further examined at considerable length, and cross-examined by counsel for defendant. While much of his testimony is not as clear or satisfactory as might be desired, yet it is such that it is impossible for a reviewing court to say that it should

McCulley v. Jones.

have been rejected by the trial court. And while it may be said that he was contradicted in some of his statements by other witnesses—some of whom were disinterested—yet the whole testimony being duly considered, I cannot say that such contradictions, or any discrepancies in the testimony are such as to call upon this court to disturb the findings of the district court. The other plaintiff, Emily McCully, also testifies among other things that her sole object in signing the deed was to release her husband, George W. McCulley, from imprisonment. None of the testimony tends to contradict her in this.

The two subsidiary questions raised by the testimony and arguments of counsel, to-wit: 1st. Whether the defendant charged the plaintiffs usurious interest on the money loaned them by him; and 2d. Whether defendant, paid the plaintiff's debt to himself out of the money of his brother David and took the renewal notes to him in good faith, or whether the taking of the renewal notes to David Jones was a device to avoid the plea of usury, does not, in my opinion, properly enter into the merits of the case, and will not be further noticed.

I think that the finding and judgment is sustained by the weight of testimony; and most certainly there is not that want of sufficient testimony to sustain them always deemed necessary to justify a reversal.

The judgment and decree of the district court are therefore affirmed.

JUDGMENT AFFIRMED.

11 516
12 510
14 247
21 367
21 368
21 646

**E. F. SIMMONS, PLAINTIFF IN ERROR, V. JOHN YURANN,
DEFENDANT IN ERROR.**

Real Estate: CONTRACT FOR CONVEYANCE: CONSIDERATION.

In an action upon a contract for the conveyance of real estate when title should be acquired under the U. S. Homestead law, and providing for part payment in breaking prairie at \$2.50 per acre, the breaking to be paid for in cash if the land was not conveyed, *Held*, 1. To recover for the breaking the petition must state the failure to convey. 2. The alleged illegality of the contract would not defeat a recovery of the price of the breaking.

ERROR to the district court for Hamilton county. Heard before Post, J., on demurrer to petition. Demurrer overruled and defendant Simmons electing to stand thereon, judgment was rendered against him, to review which he brought the cause up on a petition in error.

J. L. Miller and *J. H. Smith*, for plaintiff in error. Contract is void, and the court will not lend its aid to its enforcement by decreeing specific performance or otherwise. Nor can value of labor under said illegal contract be recovered. *Clark v. O. & S. W. R. R.*, 5 Neb., 314. 1 Story on Con., § 769. *Sellers v. Dugan*, 18 Ohio, 489. *Moore v. Adams et al.*, 8 Ohio, 373. *Williams et al. v. C. R. I. & P. R. R. Co.*, 4 N. W. R., 870. *Lea v. Collins*, 4 Sneed (Tenn.), 393.

A. W. Agee and *A. J. Rittenhouse*, for defendant in error. Admitting that the contract, so far as [it] provided for the conveyance of the land, was void, yet as Yurann was not *in pari delicto* with Simmons, although he cannot enforce specific performance of the contract to convey the land, he can enforce the contract to pay in money for the work performed. *Kerrison v. Cole*, 8 East, 236. *Howe v. Synge*, 15 East, 440. *Wigg v. Shut-*

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Heworth, 13 East, 87. *State of Ohio v. Findley*, 10 Ohio, 51. *Nebraska City v. Gas Co.*, 9 Neb., 315. *Congress and Empire Spring Co. v. Knowlton*, "The Reporter," Vol. XI, No. 12, p. 389. *Milne v. Hubee*, 3 McLean, 212. *Wooten v. Miller*, 7 S. & M., 380. *Adams v. Rowman*, 8 S. & M., 624. *Bates v. Watson*, 1 Sneed (Tenn.), 376.

BY THE COURT.

This is an action upon a written contract to recover for the breaking of forty acres of prairie. The following is a copy of the contract:

"Article of agreement entered into this 3d day of May, 1874, between E. F. Simmons and John Yurann, witnesseth: That E. F. Simmons hath sold and doth agree to convey in fee simple unto said John Yurann, by a good and sufficient deed of general warranty, when the said E. F. Simmons receives the same from the U. S. Land Office, the following premises situated in the county of Hamilton and State of Nebraska, the following real estate, to-wit: The s. $\frac{1}{2}$ of the s. w. qr. section 34, town. 9, r. 6 west. And the said John Yurann does hereby agree to pay the said E. F. Simmons the sum of two hundred and forty (240) dollars, in the manner following: One hundred dollars worth of breaking between the 1st day of May and the 4th day of July, 1874, if possible; if not, the balance during the same season 1875; the balance, \$140, at the time of receiving deed. In case the said E. F. Simmons does not receive deed for the same, he shall pay to the said John Yurann cash at the rate of \$2.50 an acre for breaking done. In testimony whereof, the said E. F. Simmons and John Yurann have hereunto set their hands and seals.

"E. F. SIMMONS, [seal.]

"JOHN YURANN. [seal.]"

Simmons v. Yurann.

A demurrer to the petition was overruled and judgment rendered in favor of Yurann.

The question to be determined is the sufficiency of the petition. The contract is set out in the petition, and it is alleged that Yurann broke up forty acres of prairie for Simmons, as provided in the contract, and that he has fully complied with the requirements of the same on his part; but that Simmons has not paid for said breaking, nor any part thereof. But there is no allegation that Simmons is unable or has refused to convey the premises described in the contract. For aught that appears in the petition, Simmons may be the owner of this land, and be ready to convey the same. Yurann is entitled to payment in money only in case he fails to receive a deed, and the petition should state that Simmons cannot or will not make a deed; in other words that there is a breach of the contract to convey. As the petition is defective in this respect the judgment of the court below must be reversed. We place no stress upon the form of the contract. As to whether or not the alleged illegality would defeat an action thereon for specific performance, is not before the court. Where a contract is prohibited by statute, a court will not lend its aid to enforce performance of the same. But a case must fall clearly within the prohibition before its enforcement will be denied. As a rule public policy is best subserved by requiring a party receiving the labor or property of another under a contract, to pay the price agreed upon for the same. The case at bar is a fair illustration. Simmons contracted to convey a portion of his homestead or pre-emption, when he acquired title, the consideration being forty acres of breaking and \$140 in money, he promising to pay \$100 for the breaking if he failed to obtain title. The breaking was done for him as required; but when he is asked to pay for the

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same, he in effect answers, "I had no authority to make the contract, and am not liable thereon." He at least had authority to contract for the breaking, and it having been performed and accepted by him, he is liable for its payment. The judgment of the district court is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

O. W. WHITE, APPELLEE, V. JOHN O. ROURKE AND
OTHERS, APPELLANTS.

11	519
15	645
17	98
18	594
19	491

Mortgage: ATTORNEY'S FEE. Upon rendering a decree of foreclosure of a mortgage for the sum of \$516.93, an attorney's fee of \$50 was allowed. The note was dated in 1876, and contained a provision for an attorney's fee in case an action was brought thereon. *Held*, 1. That the repeal of the act for the allowance of attorney's fees did not affect contracts entered into while the act was in force. 2. There being no bill of exceptions, it will be presumed that the evidence sustains the decree, and that the mortgage contained a provision for an attorney's fee so as to be notice to a purchaser of the mortgaged premises.

APPEAL from Cass county. Tried below before POUND, J.

M. Hartigan, for appellants.

W. S. Wise and *A. W. Crites*, for appellees.

BY THE COURT.

This is an action of foreclosure based upon a promissory note, of which the following is a copy:

"PLATTSMOUTH, Nebraska, December 30, 1876.

"\$400.00.

"One year after date we promise to pay to the order

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of W. E. Donelan, the sum of four hundred dollars, value received, with interest at the rate of twelve per cent per annum from date until paid. And if collected by suit we hereby agree to pay reasonable attorney's fees, and consent that same shall be taxed as costs and entered up as a part of the judgment.

her

"ELLEN X MCGUIRE,
mark.

"M. MCGUIRE."

"In presence of D. H. Wheeler."

On the 31st of August, 1880, the plaintiff filed a petition in the district court of Cass county, in which he alleges that at the date of the note, the makers thereof, to secure the payment of the same, executed a mortgage upon lots 7 and 8, in block No. 12, in the city of Plattsmouth, which mortgage was duly recorded on the 2d day of January, 1877; that on the 14th day of May, 1880, said note and mortgage were duly assigned to the plaintiff, and that on the 14th day of July, 1880, Ellen McGuire and M. McGuire conveyed the real estate in question to the defendants. The action was dismissed as to the McGuires, and the defendants herein failing to answer, a decree of foreclosure for the sum of \$516.93 and costs, and \$50 attorney's fees, was rendered by default. The defendants appeal to this court.

The principal cause of complaint is the allowance of the attorney's fee. The act to provide for the allowance and recovery of an attorney's fee in certain actions, approved February 18, 1873, provided for the allowance of an attorney's fee not exceeding ten per cent in cases wherein the mortgage or other written instrument upon which the action was brought, contained an express provision for such allowance. This act was repealed June 1, 1879, but the repeal did not affect

 Oliver v. Sheeley.

contracts entered into prior to that time, and after the act of February 18, 1873, took effect.

The defendants claim as purchasers of the mortgaged premises without notice of the provision for an attorney's fee, as it is alleged that that provision is not contained in the mortgage. There is no bill of exceptions, and no evidence before us as to the character of the mortgage; and in the absence of proof the presumption is the finding of the court is sustained by the evidence. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

JOHN M. OLIVER, PLAINTIFF IN ERROR, v. J. F. SHEELEY,
DEFENDANT IN ERROR.

1. **Bill of Exceptions.** Affidavits used on a hearing in the district court must be embodied in a bill of exceptions to be available in the supreme court.
2. **Attorney's Lien.** To entitle an attorney to be admitted as a party plaintiff in an action for the purpose of protecting and enforcing his lien, it must appear that fees are due him for services in that case.

11	521
14	275
15	401
15	406
15	630
16	180
16	185
16	372
19	148
19	491
11	531
26	409
11	538
29	329
11	521
31	120
32	299
11	591
34	658

ERROR to the district court of Douglas county.

D. Van Ertlen, for plaintiff.

Manderson & Congdon, for defendant.

MAXWELL, CH. J.

This action was brought before a justice of the peace upon an undertaking for an attachment executed by the defendant to the plaintiff, the amount of damages

Oliver v. Sheeley.

claimed being the sum of \$50. Judgment was rendered by the justice in favor of the defendant. The plaintiff appealed to the district court, and afterwards filed the following stipulation therein:

"JOHN M. OLIVER }
v.
JOSEPH SHEELEY }

"I hereby discontinue my appeal in this case and consent to a judgment for defendant.

Sept. 9, 1878.

"J. M. OLIVER."

In pursuance of the stipulation, the appeal was dismissed, and judgment rendered in favor of the defendant. O'Brien and VanEtten filed a claim before the justice for an attorney's lien for \$35 for professional services, and now ask to be subrogated to the rights of the plaintiff and be permitted to prosecute the action. There seems to have been a hearing before the district court upon certain affidavits as to whether there was an attorney's lien or not in favor of the attorneys above named, and the court appears to have found that no such lien existed. None of the affidavits used on the hearing are certified up in a bill of exceptions, and we are therefore unable to determine whether such decision was correct or not.

An attorney in an action may have a lien for fees due him for services therein on money in the hands of the adverse party, which is the subject of the litigation, and in a proper case may be admitted as a party plaintiff in that action for the purpose of protecting and enforcing his lien. *Reynolds v. Reynolds*, 10 Neb., 576. But there being no bill of exceptions the record fails to show that the attorneys in question are entitled to a lien and to be subrogated to the plaintiff's right. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

The State v. Andrews.

THE STATE, EX REL. ARTHUR B. FAIRCHILD, v. SAMUEL
L. ANDREWS AND OTHERS.

11	523
23	381
11	523
47	46

Liquor Law of 1881. Under the law of 1881 [Comp. Stat., 338], the traffic in liquors within the limits of cities and villages can only be carried on under ordinances duly passed by the corporate authorities thereof. Until this is done, no application can be made and no other step taken towards the procurement of a license to sell liquors within the limits of such corporation.

ORIGINAL application for mandamus.

W. H. Morris and *O. P. Mason*, for relator.

Hastings & McGintie, for respondent.

LAKE, J.

The particular act required of the respondents by the alternative writ heretofore issued, is to appoint a day for the hearing of remonstrances against the granting of licenses to certain persons to retail intoxicating liquors, as provided in the "act to regulate the license and sale of malt, spirituous, and vinous liquors," approved February 28th, 1881. [Comp. Stat., 333.] In the view we take of the case it is unnecessary to notice particularly but a single one of the questions presented for our consideration.

That, under the statute referred to, the sale of spirituous liquors, without a license to do so, is unlawful, will not be questioned. Section eleven provides that "All persons who shall sell or give away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks, without having first complied with the provisions of this act, and obtained a license as herein set forth, shall, for each offense, be deemed guilty of a

misdemeanor," etc. This provision is general, and in its application reaches all parts of the state, whether the same be under municipal government or not. Therefore, on the first day of June last, when this statute began its operation, the traffic in such liquors in the city of Crete, as elsewhere within the state, was absolutely inhibited, except upon the terms and conditions therein set forth, one of which is the procurement of a proper license in the manner indicated in the act.

Outside of cities and villages the granting of licenses under this act is intrusted to the boards of county commissioners in their respective counties, and the steps necessary to be taken to that end are distinctly pointed out. But this is as far as these boards can go; they have no power to regulate the traffic. As to cities and villages, however, sec. 25 provides that the "corporate authorities" thereof "shall have power to license, regulate, and prohibit the selling or giving away of any intoxicating, malt, spirituous, and vinous, mixed, or fermented liquors within the limits of such city or village," etc. By the term "corporate authorities," as we understand it, is evidently meant those officers of cities and villages to whom is given the ordinance-making power, which, in cities of the second class, to which Crete belongs, are the mayor and council thereof.

By the express terms of this act, these corporate authorities, within their several jurisdictions, and under certain restrictions and limitations, are given full control of the matter of granting such licenses, and until they have taken proper action to that end, no authorized traffic in intoxicating drinks is possible therein. Hence we are met by this question, how shall this action be taken? In other words, how shall these corporate authorities make their will as to the granting of licenses and the regulation of the traffic known?

Scott v. Waldeck.

Most clearly in precisely the same way in which alone they are authorized to act in matters of ordinary city government, or other police regulation, wherein the united action of both council and mayor is required—*by ordinance duly passed.*

It appears that the only ordinance on this subject in force in the city of Crete is one merely fixing the amount of money which the applicant for a license must pay into the city treasury therefor. There is none that licenses may be granted, nor as to what officer or officers shall receive, file, and give notice of the application, as required by sections 1 and 2 of the act; nor is there any provision as to who shall take and approve the bond of the applicant, and sign and issue the license, as required by sections 5 and 6. These, as well as several other important matters, can be regulated only by ordinances passed in due form, and until so regulated no application can be made and no other step taken by any one within the city toward the procurement of such license.

On the sole ground, therefore, of the want of suitable provision by the corporate authority of the city of Crete for the granting of licenses under the present law, the peremptory writ must be denied.

WRIT DENIED.

CYRUS V. SCOTT, PLAINTIFF IN ERROR, v. ALONZO W.
WALDECK, DEFENDANT IN ERROR.

Motion for New Trial. Where a motion for a new trial is decided at a term subsequent to that at which it is made, and one of the grounds assigned therein is that the verdict is not sustained by the evidence, a bill of exceptions, containing all the testimony signed at the term at which the motion is overruled, will be considered for the purpose of determining that question.

11	525
27	618
11	525
30	776
32	833
11	525
42	273
11	525
46	868
11	525
47	241

MOTION to quash bill of exceptions.

Laird & Smith, for the motion.

Batty & Ragan, contra.

BY THE COURT.

This case was tried at the June, 1879, term of the district court of Adams County, and a verdict rendered for the defendant. A motion for a new trial was then made by the plaintiff, which was taken under advisement by the court and overruled at the next term, and a bill of exceptions containing all the testimony was then signed by the judge. The defendant now moves to quash the bill of exceptions on the ground that it was not signed at the term at which the verdict was rendered.

When exceptions are taken to the admission or rejection of testimony in an action tried to a jury, such exceptions must be reduced to writing at the term at which the verdict is rendered, or within the time fixed by statute thereafter. *Kline v. Wynne*, 10 Ohio State, 223. *Warden v. Boyd*, 18 Id., 271. The reason is the statute fixes the time within which the exceptions are to be reduced to writing, and limits it to forty days after the trial term. If the motion for a new trial is taken under advisement and decided at a subsequent term of the court, that does not operate as an extension of the time within which a bill of exceptions must be signed. But when one of the errors assigned is that the verdict is not supported by the evidence, this court will examine the testimony for the purpose of determining that fact, and a bill of exceptions, signed by the judge at the term at which the motion for a new trial was overruled, which contains all the evidence, will be considered for that purpose alone.

MOTION OVERRULED.

STEPHEN W. LEACH, PLAINTIFF IN ERROR, V. EMILY M.
SUTPHEN, DEFENDANT IN ERROR.

1. **Forcible Entry and Detention.** An action of forcible entry and detention is not the proper remedy to try questions of title, but merely the right of possession.
2. **Bill of Exceptions.** The provision of section 311 of the code [Comp. Stat., 571] relative to bills of exceptions do not apply to justices of the peace.
3. **Motion for New Trial.** A motion for a new trial is unnecessary in cases brought to the district court on error from the justice of the peace, where no re-trial of the issues of fact is to be had.

ERROR to the district court for Washington county.
Tried below before SAVAGE, J.

Bullard & Walton, for plaintiff in error.

L. W. Osborn, for defendant in error.

BY THE COURT.

This is an action for forcible entry and detention, tried before a justice of the peace in Washington county. A judgment for the possession of the premises was rendered in favor of the defendant herein, which was affirmed by the district court. The errors assigned in this court are, in substance, that the judgment is against the weight of the evidence.

It appears from the evidence that at the May term, 1860, of the district court of Washington county, one Bartlett Brown obtained a judgment against the plaintiff in error for the sum of \$188.00 and costs, and that an execution was issued on said judgment and levied upon the real estate in controversy, which was sold to said Brown; that the sale was thereafter confirmed and a deed made to the purchaser; that Brown there-

11	527
17	187
11	527
43	235
11	527
46	858
46	887
11	527
45	87
11	527
49	435
11	527
58	214
11	527
60	707

upon conveyed to one Samuel Baker, who conveyed to the defendant, and she and those under whom she claims have paid all the taxes due on the premises, and that the plaintiff had occupied the premises since February, 1879.

The plaintiff introduced in evidence a patent from the United States for the premises in question, which was issued prior to the recovery of the judgment. He also offered to introduce evidence tending to impeach the judgment, which was excluded. This testimony was properly excluded. The action of forcible entry and detainer is not the proper remedy to try questions of title, but merely the right of possession. Here the defendant was shown to have a continuous paper title from 1861 to the time of trial, and possession until the plaintiff entered forcibly upon the premises. This was sufficient to entitle her to recover in this action, and there is no testimony in the record that would justify a judgment in favor of the plaintiff. The judgment must therefore be affirmed.

The defendant objects that the bill of exceptions signed by the justice was not submitted to her or her attorney before being signed. It is the duty of the justice to make up a correct bill of exceptions and sign the same when so required, but the provisions of sections 311 of the code of civil procedure as amended (Comp. Stat., 571) do not apply to justices of the peace.

Objection is also made that no motion for a new trial was made in the district court. This is unnecessary except in cases where questions of fact are tried and determined, and as the judgment of the justice was affirmed, there was no trial of questions of fact, and no motion was necessary. The judgment is affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. JOSEPH MCGRAW,
PLAINTIFF IN ERROR, V. GRAN. ENSIGN, DEFENDANT
IN ERROR.

11	529
19	480
11	529
143	452
11	529
48	486
11	529
49	287
53	248
54	175

1. **Criminal Law: APPEAL.** The right of appeal under section 824 of the criminal code is restricted to the defendant, and does not apply to a complainant against whom a judgment for costs has been rendered.
2. ———: costs. Where a jury found that the complaint was without probable cause, and judgment for costs was thereupon rendered against the complainant, and he was committed to jail until the same was paid, *Held*, first, that a complainant could not be imprisoned for costs; second, that costs in such case was a mere civil liability.

ERROR to the district court for Lancaster county.
Heard below before POUND, J.

Burr & Kelly, for plaintiff in error.

Galey & Abbott, for defendant in error.

MAXWELL, CH. J.

The petitioner, Joseph McGraw, on the 22nd day of April, 1881, filed a complaint on oath before J. I. Johnson, justice of the peace, charging one Frederick W. Mere, with disturbing a school meeting held on that day in school district No. 71, of Lancaster county. On the trial of the cause the jury returned the following verdict:

"STATE OF NEBRASKA }
VS. }
FREDERICK MERE. }

"We, the jury in this case, being duly impaneled and sworn, do find and say that we find the defendant not guilty, and that the complaint was without probable cause.

"Geo. P. TUCKER, foreman."

The justice thereupon rendered judgment against McGraw for all costs accrued in the proceedings, and McGraw refusing to execute a bond to pay said costs within thirty days from that date, the justice issued a mittimus to the sheriff to confine said McGraw in the county jail until said costs were paid. McGraw thereupon sued out a writ of *habeas corpus* in the district court of Lancaster county, praying for his discharge from imprisonment. On the hearing the writ was dismissed and the petitioner remanded to the custody of the jailor. He now brings the cause into this court by petition in error.

Immediately after the rendition of the judgment McGraw filed an undertaking with sufficient sureties for an appeal. The justice refused to approve the undertaking and grant the appeal, which refusal is now assigned for error. Will an appeal lie in such case?

Section 322 of the criminal code provides that: "Whenever the defendant shall be tried under the provisions of this chapter, and found guilty either by the magistrate or jury, or shall enter a plea of guilty, the court shall render judgment thereon, assessing such punishment either by fine or imprisonment, or both, as the nature of the case may require and the law permit. In such case the defendant shall, in addition to the fine or imprisonment, be adjudged to pay the costs, and to be committed to the county jail until the judgment be complied with. Whenever the defendant, tried under the provisions of this chapter, shall be acquitted, he shall be immediately discharged, and if the magistrate or jury trying the case shall state in the finding that the complaint was malicious or without probable cause, the magistrate shall enter judgment against the complainant for all costs that shall have accrued in the proceedings had upon such complaint, and shall commit such complainant to jail

The State v. Ensign.

until such costs be paid, unless he shall execute a bond to the people of the State of Nebraska in double the amount thereof, with security satisfactory to the justice, that he will pay such judgment within thirty days after the date of its rendition."

Section 323 provides that: "The judgment of the magistrate shall be carried into effect as provided in chapter forty-nine. Prosecutions under this twenty-ninth chapter shall be governed by the provisions of this criminal code, so far as the same are applicable."

Section 324 provides that: "The *defendant* shall have the right of appeal from any judgment of a magistrate, imposing fine or imprisonment, or both, under this chapter, to the district court of the county, which appeal shall be taken immediately upon the rendition of such judgment, and shall stay all further proceedings upon such judgment. No appeal shall be granted or proceedings stayed unless the appellant shall, within twenty-four hours after the rendition of such judgment, enter into a recognizance to the people of the State of Nebraska in a sum not less than one hundred dollars, and with sureties to be fixed and approved by the magistrate before whom said proceedings were had, conditioned for his appearance at the district court of the county at the next term thereof, to answer the complaint against him." Comp. Stat., 715.

The right of appeal is limited to the *defendant*, and it is impossible to extend the term to the complaining witness when assessed with costs, because the conditions of the recognizance are in substance that the defendant will appear at the next term of the district court of the county to answer the *complaint* made against him. The right of appeal being purely a statutory right, and the complainant not coming within either the letter or spirit of the law, an appeal will not lie at his instance.

The right to imprison a complainant for costs without a complaint, specifying the offense, and an opportunity to make a defense, may well be questioned.

Section 8, article I of the constitution provides that: "No person shall be deprived of life, liberty, or property without due process of law."

Section 11 provides that: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

A complaint under oath, charging a party with the commission of some offense against the law, must be filed before a party can be subjected to imprisonment in the county jail; yet the legislature has assumed to provide that upon the mere finding of a jury or justice that the complaint was malicious or without probable cause, the justice shall render judgment against the complainant for costs, and commit him to jail until he pay the same, unless he give security for their payment.

We have no hesitation in saying that in this the legislature exceeded its power. The mere failure to prove the charge made in a complaint is not conclusive evidence of want of probable cause or of malice. A party may be convinced of the existence of a tippling or gambling shop at a certain place or of other means by which the morals of the community are corrupted or debased, and yet upon the trial, from the peculiar or secret nature of the business, may be unable to prove the charge. Does such a case upon the trial assume the form of a contest between the accused and the

Delaney v. Errickson.

accuser as to which shall be imprisoned? We think not. And in no case can a complainant be subjected to imprisonment for a failure to pay costs. When the offense charged is a misdemeanor, the justice, before issuing the warrant, may require the complainant to acknowledge himself liable for the costs, and if he deem him irresponsible may require security. If the justice fails to do this, the claim is merely a civil liability, and the constitution provides that there shall be no imprisonment in a civil action except in cases of fraud. It follows that the judgment must be reversed and the petitioner must be discharged.

JUDGMENT ACCORDINGLY.

JOHN DELANEY, PLAINTIFF IN ERROR, V. CHARLES
ERRICKSON, DEFENDANT IN ERROR.

11	533
42	340
43	871
11	536
00	554

1. **Trespass on Uninclosed, Uncultivated Lands.** While the owner of domestic animals may lawfully permit them to *wander* upon and depasture the uninclosed, uncultivated lands of others, he has no right to drive them there without the owner's permission, and if he do so he is answerable for whatever damage they may do while there.
2. **Error without Prejudice.** Where a letter-press copy of a writing is erroneously admitted in evidence, if without it the undisputed evidence is ample to support the verdict, it is error without prejudice, and not a sufficient ground for the reversal of a judgment.

REHEARING of case reported in 10 Neb., 492.

LAKE, J.

While a further and more particular examination of this case leads to a different result from that previously

Delaney v. Errickson.

announced, 10 Neb., 492, we find no reason for changing in any respect our former opinion upon the three points therein discussed, but still adhere strictly to all that is there said. Therefore nothing more need here be done than to state briefly the reasons why we now conclude that the judgment of the court below should be affirmed.

At the first hearing the principal point respecting the alleged trespass brought to our notice was whether in this state the owner of domestic animals might lawfully permit them to wander upon and depasture the uninclosed, uncultivated lands of others. And our opinion on that branch of the case did not go beyond this, holding that he could. But, in reality, the record presented the further question, whether the plaintiff in error had the right to *drive* his animals upon such lands for the purpose of pasturage without the owner's permission? This is a very different question from the one previously decided, and we must answer it in the negative.

While it is true that Delaney would not have been answerable for indirect intrusions of his animals upon the land in question, he was not at liberty to drive, or have them driven, and kept there, against the wish of Errickson, as the evidence shows very conclusively that he did. We know of no law requiring as a condition to one's right to the exclusive enjoyment of his own estate as against the willful, injurious acts of others, that he shall keep it inclosed by a fence. No statute, that we are aware of, so declares; and such is not the rule of the common law, which has so great regard "for private property that it will not authorize the least violation of it." 1 Broom & Hadley's Com., Am. Ed., 116.

The theory of the defense to the alleged trespass is shown by an instruction to the jury, requested on be-

Delaney v. Errickson.

half of Delaney, and which the court very properly refused to give. It was in these words: "If you find that the land in question was uncultivated, wild prairie land, and uninclosed, and land upon which the inhabitants of that neighborhood had uninterruptedly herded their cattle and stock from the first settlement of the country, then the plaintiff is not liable in this action." Several other instructions of the same import were also requested and refused; but the court did instruct that if the jury found "that Errickson notified Delaney that he, Errickson, had leased the land in controversy, that he, Delaney, must keep his stock off the same," and that regardless of this notice "Delaney drove, kept, and herded sheep thereon," then they should "find for Errickson whatever damages the stock of Delaney did while so on the land to the grass thereon." Under the evidence this instruction was right, and taken together with the rest of the charge, very properly restricted the jury in the assessment of damages to such as were shown to have been done by the stock, not when simply straying upon the land, but when purposely driven there and kept there through Delaney's agency. Had the evidence merely shown that the cattle wandered upon the land, there would have been no cause of action, and the first instruction requested on behalf of Delaney, which the court refused, would have been proper.

But a single other point made in our former opinion remains to be noticed, and that is the error found in the admission of the letter-press copy of a letter written by the witness Dorsey to Young, the owner of the land, advising him of the fact that he had leased it, and inclosing a draft for the rent received on that account. A further examination of the evidence satisfies us that the error of admitting this copy was without the least prejudice to Delaney, inasmuch as, aside

from this item, there was ample evidence to support the finding that Dorsey was authorized to make the lease. It must be borne in mind that this dispute is not between rival claimants to a legal interest in this land, for Delaney does not pretend to be invested with any right under Young, the acknowledged owner of the fee. Such being the case, very slight evidence of authority to make the lease in one who for years has acted as the agent of the owner in paying taxes and looking after the land will suffice. On this point we quote from Mr. Dorsey's testimony:

Q. State whether that paper you hold in your hand is the lease you executed to Mr. Errickson as the agent of Mr. Young?

A. It is.

Q. As the agent of Mr. Young, as you have testified, state whether you had authority to lease this land?

Objected to by counsel for defendant as incompetent, irrelevant, immaterial, and calling for the conclusion of the witness; also, secondary evidence.

The court. Let the witness state the facts in the case.

Q. Mr. Dorsey, you may state the facts with regard to your authority to lease the land?

A. How far back shall I commence—from the first authority from Mr. Young to act as his agent?

Q. If you think it necessary?

A. Well, sir, I have general power over all of Mr. Young's land.

There were several other statements by this witness during his examination respecting his agency, but we think that this, taken in connection with the fact that Young undoubtedly received the rent through the paid draft exhibited in evidence, and which bore his genuine indorsement to the payer, is sufficient proof

Hawe v. The State.

of the validity of the lease, as between these parties at least.

For these reasons we are of opinion that our former judgment of reversal must be vacated, and one now entered affirming in all things that of the court below.

JUDGMENT ACCORDINGLY.

THOMAS HAWE, PLAINTIFF IN ERROR, V. THE STATE OF
NEBRASKA, DEFENDANT IN ERROR.

Criminal Law: INSTRUCTION TO JURY. An instruction in a trial for malicious shooting, that "the law requires something more than occasional oddity or hypochondria to exempt the perpetrator of an offense from its punishment," is not erroneous.

ERROR to the district court for Colfax county. Tried below before POST, J.

Phelps & Thomas, for plaintiff in error, cited *Stevens v. The State*, 9 Am. Law Reg., 530, and note. *Scott v. Commonwealth*, 4 Met., 227. *Commonwealth v. Mosler*, 4 Barr., 267.

C. J. Dilworth, Attorney General, for the State, cited 17 Ala., 436. 24 Cal., 230. 57 Mo., 574. 6 McLean, 121. 1 Clifford, 117. 18 N. Y., 252. 21 Cal., 544. 9 Neb., 252.

MAXWELL, CH. J.

The plaintiff was convicted at the November, 1880, term of the district court of Colfax county of maliciously shooting one August Hirn, and was sentenced

11	537
14	577
11	537
25	556
26	644
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Delaney v. Errickson.

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STAPLES

Hawe v. The State.

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For these reasons we are of opinion that our former judgment of reversal must be vacated, and one now entered affirming in all things that of the court below.

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Delaney v. Errickson.

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Q. As the agent of Mr. Young, as you have testified, state whether you had authority to lease this land?

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Hawe v. The State.

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MAXWELL, CH. J.

The plaintiff was convicted at the November, 1880, term of the district court of Colfax county of maliciously shooting one August Hirn, and was sentenced

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Q. State whether that paper you hold in your hand is the lease you executed to Mr. Erickson as the agent of Mr. Young?

A. It is.

Q. As the agent of Mr. Young, as you have testified, state whether you had authority to lease this land?

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The court. Let the witness state the facts in the case.

Q. Mr. Dorsey, you may state the facts with regard to your authority to lease the land?

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Hawe v. The State.

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from this item, there was ample evidence to support the finding that Dorsey was authorized to make the lease. It must be borne in mind that this dispute is not between rival claimants to a legal interest in this land, for Delaney does not pretend to be invested with any right under Young, the acknowledged owner of the fee. Such being the case, very slight evidence of authority to make the lease in one who for years has acted as the agent of the owner in paying taxes and looking after the land will suffice. On this point we quote from Mr. Dorsey's testimony:

Q. State whether that paper you hold in your hand is the lease you executed to Mr. Errickson as the agent of Mr. Young?

A. It is.

Q. As the agent of Mr. Young, as you have testified, state whether you had authority to lease this land?

Objected to by counsel for defendant as incompetent, irrelevant, immaterial, and calling for the conclusion of the witness; also, secondary evidence.

The court. Let the witness state the facts in the case.

Q. Mr. Dorsey, you may state the facts with regard to your authority to lease the land?

A. How far back shall I commence—from the first authority from Mr. Young to act as his agent?

Q. If you think it necessary?

A. Well, sir, I have general power over all of Mr. Young's land.

There were several other statements by this witness during his examination respecting his agency, but we think that this, taken in connection with the fact that Young undoubtedly received the rent through the paid draft exhibited in evidence, and which bore his genuine indorsement to the payer, is sufficient proof

Hawe v. The State.

of the validity of the lease, as between these parties at least.

For these reasons we are of opinion that our former judgment of reversal must be vacated, and one now entered affirming in all things that of the court below.

JUDGMENT ACCORDINGLY.

THOMAS HAWE, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

Criminal Law: INSTRUCTION TO JURY. An instruction in a trial for malicious shooting, that "the law requires something more than occasional oddity or hypochondria to exempt the perpetrator of an offense from its punishment," is not erroneous.

ERROR to the district court for Colfax county. Tried below before Post, J.

Phelps & Thomas, for plaintiff in error, cited *Stevens v. The State*, 9 Am. Law Reg., 530, and note. *Scott v. Commonwealth*, 4 Met., 227. *Commonwealth v. Mosler*, 4 Barr., 267.

C. J. Dilworth, Attorney General, for the State, cited 17 Ala., 436. 24 Cal., 230. 57 Mo., 574. 6 McLean, 121. 1 Clifford, 117. 18 N. Y., 252. 21 Cal., 544. 9 Neb., 252.

MAXWELL, CH. J.

The plaintiff was convicted at the November, 1880, term of the district court of Colfax county of maliciously shooting one August Hirn, and was sentenced

11	537
14	577
11	537
25	556
26	644
11	537
31	410
11	537
158	229

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Hawe v. The State.

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THOMAS HAWE, PLAINTIFF IN ERROR, V. THE STATE OF
NEBRASKA, DEFENDANT IN ERROR.

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MAXWELL, CH. J.

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11	537
14	577
11	537
25	556
26	644
11	537
31	410
11	537
158	229

to imprisonment in the penitentiary for five years. He now prosecutes a writ of error to this court.

The only error relied upon is the following instruction, given on behalf of the state. "The law requires something more than occasional oddity or hypochondria to exempt the perpetrator of an offense from its punishment. If the defendant was in possession of reason, thought, intent, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil, then the fact of the offense and the condition of mind above described, proved beyond a reasonable doubt, your verdict should be guilty."

The court, prior to giving the above, had instructed the jury fully upon all the questions raised by the indictment, and also upon the question of insanity, and the instructions so given are certainly favorable to the accused. The instruction complained of in effect says to the jury that mere oddity or hypochondria is not insanity, and if the accused at the time of committing the offense was in possession of reason, and was able to discern right from wrong, he would be responsible for his actions.

Webster defines the word "insane," as "exhibiting unsoundness of mind; mad; deranged in mind; delirious; distracted."

The question here involved was before this court in *Wright v. The People*, 4 Neb., 409. The court say: "It is a familiar rule of the common law that to constitute a crime there must, in almost all cases, be, first, a vicious will, and secondly, an unlawful act consequent upon such vicious will. Broom & Hadley's Coms. (Am. Ed.), 339. And where an individual lacks the mental capacity to distinguish right from wrong, in reference to the particular act complained of, the law will not hold him responsible. *Flanagan v. The People*, 52 N. Y., 467. 11 Am. Rep., 731. *State v. Lawrence*,

Engster v. The State.

57 Mo., 574. *Com. v. Heath*, 11 Gray, 303. This mental incapacity may result from various causes, such as nonage, lunacy, or idiocy, and whenever interposed as a defense, the inquiry is necessarily reduced to the single question of the ability of the accused to distinguish between right and wrong at the time of committing the act complained of. *Freeman v. The People*, 4 Denio, 28. But even where insanity is shown to exist, and whether it be general or partial, the rule seems to be substantially as charged by the court below, that if there remains a degree of reason sufficient to discern the difference between good and evil, at the time the offense was committed, then the accused is responsible for his acts. *Hopps v. The People*, 81 Ill., 385."

We adhere to the rule laid down in the above opinion as being sound in principle. There is therefore no error in the instruction, and the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

EDWARD ENGSTER, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: EVIDENCE.** On the trial of one E. for receiving stolen goods, the statute making the receiving of such goods of the value of \$35.00 and upwards a felony, *held* that it devolved on the state to prove by competent testimony that the value of such goods was at least \$35.00.
2. —: —: **Competency of witnesses.** A witness before he is competent to testify as to the value of property must show by his testimony that he has knowledge of the value of such property.

ERROR to the district court for Franklin county.
Tried below before GASLIN, J.

11	539
28	303
11	539
42	687
11	539
51	581
52	728

James Laird and Benjamin F. Smith, for plaintiff in error, cited 1st Wharton's Evidence, sec. 447. 2 Id., sec. 1290.

C. J. Dilworth, Attorney General, for the State.

MAXWELL, CH. J.

The plaintiff was convicted at the June term of the district court of Franklin county for receiving stolen goods of the value of \$35.00, and was sentenced to imprisonment in the penitentiary for three years. He now prosecutes a writ of error to this court.

The verdict of the jury is as follows:

"THE STATE OF NEBRASKA }
 VS. }
 EDWARD ENGSTER."

"We, the jury in this cause, being duly empaneled and sworn, do find and say that we find the defendant Edward Engster guilty as charged, and the value of the property stolen and received is \$35.00 thirty-five dollars, and we, the jury, do recommend your honor to be as lenient as the law will allow.

"WM. WESTON, FOREMAN."

It appears from the testimony that in March, 1879, there was stolen from the residence of one Ulrich Signor, in Franklin county, certain clothing valued by himself at a very large sum. In June following one John Grany was indicted for the larceny, and the plaintiff for receiving the goods, knowing them to have been stolen. A nolle was entered as to the indictment against Grany, and he was the principal witness to secure the conviction of the plaintiff. It appears from Grany's testimony that he was boarding with the plaintiff and that he and another stole the goods in question and secreted them for a week or ten days at

various places on the premises of the plaintiff; that in consequence of rain he removed them to the plaintiff's cellar in his absence. Up to this point all the testimony concurs in showing that the plaintiff had no knowledge whatever that the goods were on his premises.

Upon his return home Engster was informed by Grany that clothing was in the cellar, but there is a conflict of testimony as to whether or not he knew it was stolen. There is no doubt, however, that he had reason to suspect that it was stolen, and he should have informed the authorities at once of the facts. Upon the sufficiency of evidence upon this point we express no opinion, as there must be a new trial by reason of a failure of proof upon another point.

Section 116 of the criminal code under which the plaintiff was indicted is as follows: "If any person shall receive or buy any goods or chattels of the value of thirty-five dollars or upwards that shall be stolen or taken by robbers, with intent to defraud the owner, or shall harbor or conceal any robber or thief guilty of felony, knowing him or her to be such, every person so offending shall be imprisoned in the penitentiary not more than seven years nor less than one year."

Mr. Signor, the prosecuting witness, called on behalf of the state to prove the value of the clothing, testified on cross-examination as follows:

Q. Are you a judge of clothing?

A. Yes, sir; of mine.

Q. Are you a judge of the price of clothing?

A. I guess I am.

This witness in his testimony nowhere states facts showing a knowledge of the value of clothing; yet he was permitted to testify as to the value of the clothing which was stolen.

C. A. Pierce, deputy sheriff, called on behalf of the

state, testified as follows: "I have worked in a general merchandise store; I think I am acquainted with the value of clothing." He was then permitted to testify as to the value, although it nowhere appears that he had purchased or sold clothing, or knew anything of its value, and fixed the same at the sum of \$57.00.

On the part of the defense Wm. Stadelman was called, who testified that he was a merchant at Bloomington, and had been engaged in the business of selling ready-made clothing for twenty-five years, and then specifying the value of each article in detail the aggregate of which was \$22.95. In this he was corroborated by Mr. Bodien, a merchant engaged in the clothing business at Bloomington.

A party who is permitted to testify as to the value of property must show by his testimony that he possesses knowledge as to such value, otherwise his testimony is mere conjecture and is wholly unreliable. In an indictment where the value of the property must be or exceed \$35.00 to constitute a felony, such value must be proved like any other fact upon which a conviction depends beyond a reasonable doubt. This is a material fact, without proof of which the prosecution must fail. The receiver of stolen goods at common law, knowing them to have been stolen, was indictable for misprision. But by statute, 3 and 4 W. and M. Ch. 9, the receiver was made an accessory after the fact. The statute, 5 Anne, Ch. 31, Sec. 5, confirmed that of William and Mary, and Sec. 6, as also 1 Anne, 2, Ch. 9, provided that when the thief could not be taken the receiver might be prosecuted separately for the misdemeanor. Under our statute the receiver may be proceeded against for felony as a substantive offense, whether the principal offender is punished or not. We express no opinion upon the propriety of discharging Grany, who seems to glory in his theft,

Engster v. The State.

and whose guilt is beyond question, and the prosecution of the plaintiff upon what, so far as the record discloses, is very unsatisfactory evidence. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

LAKE, J., dissenting.

Finding myself unable to unite with my brethren in the reversal of this judgment, and differing so widely from them, I feel constrained to depart from my usual course in such cases, and to state the grounds of my dissent, which briefly are the following:

The reversal, as we see, is placed solely on the ground of the insufficiency of the evidence as to the value of the property in question, that from it the jury were not warranted in affixing to it the value of \$35.00, which they did.

As to the sufficiency of evidence, Mr. Greenleaf, in his work on the subject, vol. 1, sec. 2, says: "*By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest. Questions respecting the competency and admissibility of evidence are entirely distinct from those which respect its sufficiency or effect, the former being exclusively within the province of the court, the latter belonging exclusively to the jury.*" With this rule in

view as the one by which this, as well as the trial court, ought to be governed in reviewing the finding of the jury. Let us look to the testimony upon the question of value.

Ulrich Signor, the owner of the stolen articles, which were his own clothing, was called as a witness for the prosecution, and without objection on his direct examination, testified as follows on the point we are now considering. I quote from the record:

Q. Look at that pair of pants and see if you recognize them?

A. Yes, sir; there is a whole suit like those.

Q. What is it worth?

A. \$45.00 for the whole suit.

Q. Well, what are the pants worth?

A. \$11.00.

Q. Recognize that coat?

A. Yes, sir; that is my coat.

Q. What is the coat worth?

A. \$25.00.

Q. Is it a ready-made coat?

A. It was made in New York by a tailor.

Q. Is that your vest?

A. Yes, sir.

Q. What is the value of the vest?

A. About \$8.00. The whole suit I paid \$45.00 for.

Q. Here is another vest; do you recognize that?

A. Yes, sir.

Q. What is it worth?

A. \$5.00.

Q. Do you recognize that coat? (Handing witness another.)

A. Yes, sir.

Q. Whose is it?

A. Mine; it was taken from me.

Q. What is the value of it?

A. \$2.00.

Q. Do you recognize that coat? (Handing witness another.)

A. Yes, sir; that was mine, and it was taken from me.

Q. What is the value of that?

A. \$2.00.

Q. Do you recognize these drawers?

A. Yes, sir, by that spot on them.

Q. What are they worth?

A. \$1.00.

Q. Do you recognize these knit drawers? (Handing witness another pair.)

A. Mine.

Q. What are they worth?

A. \$1.00.

Q. Do you recognize that white vest?

A. Yes, sir; that is mine.

Q. What is the value of it?

A. \$2.00.

Q. Do you recognize that undershirt?

A. Yes, sir; it is mine.

Q. What is the value of it?

A. \$2.00.

Q. Do you recognize that shirt?

A. Yes, sir; that is mine and was taken with the rest.

Q. What is the value of it?

A. \$1.50.

Q. Do you recognize that undershirt? (Handing another.)

A. Yes, sir; that is mine.

Q. What is it worth?

A. \$1.00.

Q. Do you recognize that sack?

A. Yes, sir; it is one of the bags I lost.

Q. What is it worth ?

A. 25 cents.

Q. What is that worth ? (Showing witness a razor.)

A. About \$2.00.

By this testimony it will be seen that the value put upon the property is nearly twice that which the jury actually returned. But this is not all. A witness named Pierce was called on behalf of the state, who swore that he had been employed in the capacity of clerk in a general merchandise store, and knew the value of clothing. His competency to estimate the value was also unquestioned, and, omitting the razor and some other of the smaller articles, his valuation in the aggregate was considerably over fifty dollars. This evidence seems to be entirely disregarded by the majority of the court in their opinion, although no objection was made to its admission at the trial, or afterwards in the motion for a new trial. Disregarding it entirely, they seem to put implicit confidence in the two witnesses called in defense, who, without the least reason as I think, and as the jury, who had the articles in question before them for inspection, probably thought, placed the value at less than \$35.00.

Such being the testimony, I am of the opinion that the granting of a new trial, on the ground selected by my brethren, is a clear usurpation of the province of the jury and, as I believe, unsupported by any decision that can be found in the books.

For these reasons I am of the opinion that the conviction was right, and a new trial should be denied.

Pleuler v. The State.

ANDREW PLEULER, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Statute: CONSTITUTIONALITY OF.** To justify a court in pronouncing an act of the legislature unconstitutional, it must be clear, and free from reasonable doubt that it is so.
2. **Taxation: UNIFORMITY.** The rule of uniformity in taxation required by section 1, Article IX, of the constitution of this state, is satisfied if duly observed as to each jurisdiction for whose use the particular taxes are levied.
3. **License Fees Not Taxes.** The exaction of license fees, under the act "to regulate the license and sale of malt, spirituous, and vinous liquors," etc., approved February 28th, 1881, is not taxation, either in the ordinary or the constitutional signification of that term.
4. **Liquor Law of 1881 Constitutional.** The above mentioned act conflicts with no provision of the constitution of this state, and is, *in all respects*, a valid law.
5. **License Privileges.** Privileges granted under the former license law, which was repealed by this one, were absolutely revoked upon its taking effect.

ERROR to the district court for Douglas county, where plaintiff in error had been indicted for selling spirituous liquors without having a license therefor, under and pursuant to the act of February 28th, 1881, "to regulate and license the sale of malt, spirituous, and vinous liquors," etc., and without having complied with the provisions of that act. Upon a plea of not guilty there was a trial before SAVAGE, J., and a jury. The state gave evidence tending to show that spirituous and malt liquors were sold by the plaintiff in error, in the city of Omaha, on the twenty-second day of June 1881; and that he had not procured a license therefor from the city, pursuant to said act. Thereupon, the plaintiff in error moved that the jury be directed to return a verdict of not guilty, and that the plaintiff in

11	547
12	282
17	816
17	817
18	324
18	325
23	377
24	621
11	547
27	790
11	547
33	830
11	547
35	84
11	547
37	519
11	547
39	667
11	547
51	876
11	547
59	427
11	547
60	419
11	547
62	435

error be discharged, grounding the motion upon the alleged unconstitutionality of the act. This motion was overruled, to which exceptions were taken. The plaintiff in error then testified that on the day and at the place where the liquor and beer were sold, according to the witnesses of the state, he was carrying on business under a license for selling spirituous liquors (which was afterwards offered in evidence), dated January 1st, 1881, for which license he had paid \$100; and that he had complied with all the provisions of the law then in force regulating the sale and dealing in liquors. The license was then offered in evidence, and was, upon objection, excluded. The court instructed the jury to the effect that if the plaintiff in error sold liquors as charged, and had not a license therefor under the act in question, the verdict must be guilty. To this exceptions were duly taken. A verdict of guilty was rendered. Motion for a new trial was made and overruled. Judgment was pronounced, and its execution suspended, on application of the plaintiff in error, to enable him to apply for the writ of error which brought the case here.

E. Wakeley and J. C. Cowin, for plaintiff in error.

The act is unconstitutional. 1. The exaction is a tax on the business of selling liquors. Cooley on Taxation, 1, 3, 5, 10, 403, 408. Burroughs on Taxation, 69. It is none the less a tax because the object may be wholly or in great part to prevent and discourage the business. The manner in which the sum is levied, whether as a tax in name, to be collected like other taxes, or as payment for a license to carry on the business, is not material. The last may be a tax as well as the first. The exacting of any greater sum than could be properly demanded as a mere incident to the

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power to license and regulate the business is taxation. *Ward v. Maryland*, 12 Wall., 418. *Lucas v. The Lottery*, 11 Gill & Johns., 506. *Kitson v. The Mayor*, 26 Mich., 325. *Essex Co. v. Barber*, 7 N. J. L., 64. *Kip v. City of Patterson*, 26 Id., 298. *Mayor v. Second Av. Ry. Co.*, 32 N. Y., 26. *Com. v. Stadder*, 2 Cush., 562. *Mays v. Cincinnati*, 1 O. St., 268. *St. Louis v. Boatmans' Ins. Co.*, 47 Mo., 150. *Collins v. Louisville*, 2 B. Mon., 134. *Wendover v. Lexington*, 15 Id., 258. *Mason v. Lancaster*, 4 Bush., 406. *Kniper v. Louisville*, 7 Id., 599. *Youngloves v. Sexton*, 32 Mich., 406. *Chilvers v. People*, 11 Mich., 43. *State v. Hoboken*, 33 N. J. L., 280. These authorities indicate the distinction between *licensing* the traffic in liquors and *taxing* it. A license fee may be exacted, provided it does not transcend the just limits of such a fee and encroach on the domain of taxation. The amount must be limited to covering expenses caused by the business. But this law empowers a municipality to demand any sum, for any purpose, as a condition of pursuing the business. It therefore permits taxation—a tax upon the business of liquor sellers—a tax upon the privilege of carrying it on. By the constitution, sec. 6, art. V, the support of the common schools—the free education of the children—are made state objects and state duties. By the constitution, sec. 5, Id., and by this law, every dollar paid for license money is devoted exclusively to this state object. Not one cent goes to defray the expenses which the liquor traffic may cause. It goes to the same fund and to the same purpose as money raised by a school tax. It has every element of a tax for revenue. *Greencastle v. The State*, 5 Ind., 557. The constitution, sec. 1, art. IX, requires this taxation to be uniform as to the class which is taxed. But the tax imposed by this provision is wanting in every element of uniformity. Nor is it a good answer to say the con-

stitution is satisfied if the tax or license fee is the same throughout the municipality imposing it. It must be imposed by or under a "general law, uniform," etc. The obvious and unquestionable purpose was that the uniformity should be co-extensive with the jurisdiction embraced in the operation of this general law. The object of the provision would be wholly frustrated if the taxing power could by general law be parcelled out to small subdivisions of the state on condition that it should be experienced with uniformity therein. That the legislature cannot delegate to a municipality a power to reject the rule of uniformity which is binding upon itself will doubtless be conceded. *Knowlton v. Supervisors*, 9 Wis., 410. *Gilman v. City of Sheboygan*, 2 Black, 510. The act, secs. 4, 18, and 28, confers legislative power on the judiciary. This violates the constitution. The constitution is also violated by arbitrarily prohibiting the sale of liquors within a strip of two miles around an incorporated city or village, while it is permitted both without and within that limit.

2. The privilege of selling liquors, given to the accused by his license, was not taken away by the repeal of the law under which it was given, or by the enactment of that which took its place. The unquestioned rule is that the repeal of a statute takes away only such rights and remedies as did not exist independently of it; in other words, such only as owed their existence solely to it. The license was an affirmative grant of a privilege, for a valuable consideration, and on other onerous conditions, to carry on a traffic in liquors for a specified time. It is very clear that a new statute, enacted before this privilege had expired, could not take it away without a retrospective operation. Statutes will not be construed as intended to act retrospectively unless this intention clearly appears. *Dwarris on Statutes*, p. 162. And the intent to take away privi-

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leges already granted does not appear in this act. The conditions upon which it shall be carried on are changed. This is all. No intent can therefor be presumed to take away rights already granted. The argument on this basis would prove too much, as it would follow that a new law making the conditions less onerous, the sum to be paid for licenses smaller, and the bond to be given less stringent, would require those who had complied with the old law to forego all benefit therefrom, and pay, in addition, the smaller sum, and give, in addition, the less stringent bond. It would follow, further, that the repeal of the old law and the enactment of a new one, making even the slightest change, would blot out all rights conferred by the old. To take away a privilege granted by the state, for a valuable consideration, to carry on a lawful business, without providing for a restoring of the money, or a just proportion of it, would be an act of *bad faith* on the part of the legislature, which should not be imputed to it. *Torrey v. Corlis*, 33 Me., 333. *Ganett v. Higgins*, 1 Scam., 335. *Robinson v. Bowen*, 2 Id., 499. *White v. Blum*, 4 Neb., 555. *Belvidere v. Warren Co.*, 34 N. J. L., 193. *Baldwin v. Newark*, 38 Id., 158. *Vreeland v. Bramhall*, 39 Id., 1. *City of Elizabeth v. Hill*, Id., 555. *State v. Ferguson*, 62 Mo., 77. *Wood v. Oakly*, 11 Paige, 400. *Butler v. Palmer*, 1 Hill, 335. *Sackett v. Andros*, 5 Id., 227. *Plumb v. Sawyer*, 21 Conn., 351. *Murray v. Gibson*, 15 How., U. S., 421. *Chilcvers v. The People*, 11 Mich., 43. *State v. Hoboken*, 33 N. J. L., 280. The same rule of construction which would take away this privilege would take away from every lawyer in Nebraska his license to pursue his profession under the existing law, if this should be repealed and a new one enacted imposing different conditions. Grant that this *might be* done. Would it be presumed that there was an intention to do this unless

language should be employed clearly indicating it? The authorities say no, and the common understanding of reasonable men would be to the contrary. It will be found that most of the decisions, if not all, holding that the right is taken away by subsequent legislation, are grounded on an expressed intent.

8. One other question remains—whether, on account of these unconstitutional provisions, the law must be wholly set aside; or whether, notwithstanding them, the penalties can be enforced. The rule on this subject has become established, and the question is whether this case falls within it. If the unconstitutional provisions so enter into the frame-work, texture, and objects of the law that they must be held to have been inducements to its passage, or to be essential to its operation, or indispensable parts of it, or if it is therefrom presumable that without them the law would not have been enacted, then the whole law must go. Tested by any of these criteria, this law can not stand. The matters complained of are important and fundamental. It is beyond all question that the raising of the license fee, and the demand of a large sum which gives to this law its distinctive appellation of “high license,” in the popular phrase, was of the very essence of it in the estimation of its framers and supporters.

G. W. Ambrose (*E. Estabrook* with him), for the defendant in error.

1. No one is here complaining of the action of the commissioners in refusing a license within two miles of the city limits. The question of whether the board rightfully refused to grant a license upon proper evidence, or whether the legislature can declare the kind of evidence necessary to sustain an action for damages

under this law, or whether the remission of a penalty is an executive function only, are none of them now before this court. And if they were, and each and all of them considered unconstitutional, still the question of the power of the legislature to regulate the sale of liquor, and the exacting of a license fee for the carrying on of the business would remain untouched. It is a familiar rule that even parts of an act, or even parts of a section of an act may be inhibited and still the balance be good. *Dillon Municipal Corp.*, sec. 354. *Commonwealth v. Hatchings*, 5 Gray, 482. *Rogers v. Jones*, 1 Wend., 237. *Santo v. State*, 2 Iowa, 165. *Kittering v. Jacksonville*, 50 Ill., 39.

2. The words tax and assessment are often used interchangeably in legislation, but in constitutional provisions they have a separate and distinct meaning—one for purposes of general revenue, the other for local purposes. In the section under consideration the power is given the legislature to “provide such revenue as may be needful by levying a tax by valuation,” etc. This of course, it is conceded, refers to general revenue. In the same sentence, separated by a comma and connected by the word “and” it provides, “and it shall have power to tax peddlers, brokers, liquor dealers,” etc., “in such manner as it shall direct by general law, uniform as to the class upon which it operates.” Here the one mode for raising general revenue is by a uniform tax upon property by valuation, the other is by a tax upon classes of business by some other mode than valuation, but uniform as to the class. The constitution has in view general revenue only in its reference to taxing the class of business here in question. *A. & N. R. R. v. Lancaster County*, 4 Neb., 537. *Tiernan v. Rinker*, 102 U. S., 123.

3. The police power of a state, in a comprehensive sense, embraces its system of internal regulation by

which it is sought, not only to preserve public order and prevent offenses against the state, but to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and insure to each the uninterrupted enjoyment of his own, so far as it is reasonable and consistent with the like enjoyment of all rights by others. This power secures protection to the lives, limbs, comfort, and quiet of all persons, and the protection of all property within the state; each person using his own property so as to not prevent the enjoyment by others of theirs; the general comfort, health, and prosperity of the state being the object. *Thorpe v. The Railroad Co.*, 27 Vermont, 140. *People v. Mich. Plank Road*, 10 Mich., 307. *License Cases*, 5 How., 632. *Commonwealth v. Tewksbury*, 11 Met., 55. The regulations of the liquor traffic come within this power. They are looked upon as police regulations, established by the legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances. There are many statutes in this country which have declared the keeping of liquor for sale a nuisance, and have provided legal process for its diminution and destruction, and to seize and condemn the building occupied for that purpose. These statutes have by an overwhelming weight of authorities been sustained. 2 Story on Constitution, sec. 1954. *Burch v. Savannah*, 42 Ga., 596. *Falmouth v. Watson*, 5 Bush. (Ky.), 660. *Thompson v. The State*, 15 Ind., 449. *Santo v. The State*, 2 Iowa, 165. *Kilson v. Mayor*, 26 Mich., 325. *Board of Excise v. Barrie*, 34 N. Y., 657. *Kittering v. Jacksonville*, 50 Ill., 39. *Turnan v. Kinker*, 102 U. S., 123.

4. A license is not a tax. It is only a police regulation. *Frankfort v. Philadelphia*, 58 Penn. State, 119. *Johnson v. Philadelphia*, 60 Penn. State, 445.

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Chicago Packing Co. v. City of Chicago, 88 Ills., 281. *Allerton City Railway Company*, U. S. Circuit Court Illinois. *Munn v. The State*, 94 U. S., 113.

5. If this law be not uniform in its operations, then the principle which underlies all tax laws—uniformity—has been violated from the inception of the territorial government, and each subsequent legislature of the state since 1867 has violated it, and this court and the courts of the United States have sanctioned its violation by the inforcement of the school taxes voted by the several school districts, as, in the judgment of the voters, their needs may require. No two are alike. The taxes are not uniform, yet such has been the policy of the law makers of this state and territory that such taxes have been imposed, and no one has seen fit to call them in question. *St. Louis v. Wherung*, 46 Ill., 392. *Ex parte Hart*, 49 Cal., 557. *Burchholler v. McConnellsville*, 20 Ohio State, 312.

6. The license under the old law is no protection. Sedgwick on Con., 104, 105. *Stone v. Mississippi*, 101 U. S., 814.

LAKE, J.

In the consideration of this case it should be kept in mind that to justify a court in pronouncing an act of the legislature unconstitutional, it must be clear and free from reasonable doubt that it is so, not a doubtful and argumentative implication. Or, in other words, a statute should not be held invalid unless it is clearly forbidden by the paramount law. Such substantially has been the holding of all courts speaking upon this subject. *Cooper v. Telfair*, 4 Dallas, 14. *Sharpless et al. v. The Mayor etc.*, 21 Pa., 147. *Adams v. Howe*, 14 Mass., 340. *City of Lexington v. McQuillan*, 9 Dana, 513. *Santo v. The State*, 2 Ia., 165. *The State*,

ex rel., v. County Judge, 2 Ia., 280. *Fisher v. McGirr*, 1 Gray, 1. *Sears v. Cottrell*, 5 Mich., 251. *Tyler v. The People*, 8 Mich., 333. *Hill v. Higdon*, 5 Ohio Stat., 243.

The primary and chief reason urged for the reversal of this judgment is, that the act under which the conviction was had is in conflict with Sec. 1, Art. IX of the constitution of this state, which is that: "The legislature shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph, and express business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates."

The ground of the alleged infraction of this provision of the constitution is, that the money exacted for a license issued under the act in question is simply a tax upon the business of the licensee, and, as necessarily imposed under the law, lacks the essential element of uniformity. As we view the law, however, this question of uniformity is not necessarily involved in the decision to be here made, and, even if the claim that this exaction of license money is but taxation, pure and simple, whatever might be said of the manner of its enforcement, it is not at all clear to our minds that the law itself is wanting in this particular.

This statute is in many respects a peculiar one. In the first place it will be observed that, without action by the local authorities under it, it is strictly a prohibitory law throughout the entire state. The eleventh

section provides that: "All persons who shall sell or give away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks, without having first complied with the provisions of this act and obtained a license as herein set forth, shall, for each offense, be deemed guilty of a misdemeanor," etc.

As before said, this prohibition is general, covering the whole state, but, presumably out of respect and in deference to the varying sentiments of the local communities in the several counties, cities, and villages on the subject of liquor traffic, provision is made for its legalization under very stringent regulations through the medium of licenses, which may be obtained if the local authorities in their discretion see fit to grant them. In effect, it is simply a local option law, for the local officers may either license, or refuse to license, as they "shall deem best."

By sec. 5, art. VIII of the constitution "All fines, penalties, and *license* moneys, arising under the general laws of the state," belong to the school fund of counties, cities, and other local subdivisions, respectively, in which they are collected, so that, even if these license moneys were to be deemed taxes, within the meaning of the constitutional provision relied on, and to which we shall hereafter refer more particularly, they are not state, but merely local taxes, and if enforced within each of the inferior jurisdictions according to some uniform rule, the objection here urged could have no force, for it seems to be well settled that this rule of uniformity is fully satisfied if duly observed within each jurisdiction for whose use the taxes are levied; state taxes uniform throughout the state, county taxes throughout the county, city taxes throughout the particular city, etc., being all that is required, although levied under a general law of the state.

In *Youngblood v. Sexton*, 32 Mich., 406, the principal question was as to the validity of an act for the taxation of liquor traffic. It was objected that it violated a provision of the constitution of that state, which required all specific state taxes, except those received from certain mining companies, to be applied "in paying the interest on the primary school, university, and other educational funds, and the interest and principal of the state debt," etc. But by the act in question the taxes were appropriated "to the use of the towns, villages, and cities in which the business taxed was carried on." The court held that although levied in pursuance of a general law of the state, it was not a state tax within the meaning of the constitution. Being put to the use of the community which paid it, it was in no proper sense anything more than a local tax, and that the constitutional requirement of uniformity was satisfied by the tax being levied upon all dealers alike, without discrimination on account of the amount of business done. See also upon this point: *Commissioners of Ottawa Co. v. Nelson*, 19 Kans., 234. Reported in 27 Am. Reports, 101. *City of New Orleans v. Kaufman*, 29 Am. Reports, 828, and 29 La. Ann. 283. *State v. Rolle*, 31 Am. Reports, 234, and 30 La. Ann. 991. From these authorities it would seem that even if the exaction of this money were to be regarded as a species of taxation simply, the constitutional rule of uniformity would not be broken so long as, within the particular district, no discrimination is made in the amounts required from persons applying for licenses.

But do these license moneys fall within the purview of the provision of the constitution above quoted? It is strenuously insisted by counsel for the plaintiff in error in their brief, and was in oral argument at the bar, that they do, and many authorities were cited as sustaining that view, the more prominent of which we

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will now notice very briefly: The first case in the order of citation is that of *Ward v. Maryland*, 12 Wall., 418, wherein it appears that, by a state statute, resident traders were required to take licenses and pay therefor from twelve to one hundred and fifty dollars, according to a sliding scale, with reference to stock in trade. Non-resident traders were required to pay three hundred dollars annually for the same privilege. It was held that the exaction was a tax, and that the distinction made between resident and non-resident traders rendered the law repugnant to Sec. 2, Art. 4 of the constitution of the United States. In this case the exaction was clearly a tax, and nothing else, as the purpose of the law was, *not regulation*, but the raising of revenue alone.

The next case, that of *Essex v. Barber*, 7 N. J. L., 64, is one in which it appears that, in the incorporation of certain towns, power was given them to license inn-keepers under certain restrictions. Afterwards a general act was passed giving power to the several county authorities to license inn-keepers, and also to tax them from ten to seventy dollars, according to certain regulations. The regulations about the power to license were, that innkeepers should be recommended by certain persons; that their licenses should be for only one year; that they should enter into recognizance with surety, etc. The regulations surrounding the power to impose the tax respected the situation and advantages of the place for an inn; the limitations of the amount; the paying down of the money, and the way it should be appropriated. The last named act also contained a provision that nothing contained therein should "affect the rights, powers, privileges, and immunities given and granted by law to any city or town corporate, relative to the licensing of inns and taverns," they "conforming to the directions,

and being subject to the limitations, restrictions, and provisions herein contained, and given to the courts of general quarter sessions of the peace in the several counties of the state." Under these provisions it was held that there was a radical difference between the power given to cities and that given to counties, and that the former had no power to tax.

In *Kip v. The City of Paterson*, 26 N. J. L., 298, an ordinance of the city required all persons who sold hay or other produce, and delivered the same within the city, to pay a fee of five cents. This was held to be an unwarranted and unreasonable exercise of the power to regulate the police of the city, and unauthorized by the charter. This was a question solely of municipal power.

In *Mayor, etc., v. Second Ave. R. R. Co.*, 32 N. Y., 261, it was held that an ordinance imposing a license duty upon city cars, *for revenue purposes only*, was not an ordinance for police and internal government. Of this ordinance the court said: "There is nothing for the railroad corporation to do but to pay the mayor the sum of fifty dollars annually for each car, and receive in return a license or certificate that the money has been paid. The ordinance imposes no duties to be observed by the company or its servants, but the single act of paying the money. It prescribes no regulations in regard to the size, dimensions, comfort, and cleanliness of the cars, the speed at which the same shall be run, the manner of receiving and discharging passengers, their numbers and names, and the stations at which they shall stop. Regulations of police are regulations of internal or domestic government, forbidding some things, and enjoining the performance of others, for the security and protection and to promote the happiness of the governed. The only act enjoined by the ordinance in question is the payment of the

fifty dollars, and the only act which it forbids is the running of the cars without the payment of the money." We quote thus largely from the opinion in this case, for the reason that it draws, very clearly, the real distinction that exists between an exaction of money as a tax merely for revenue purposes, and one which is but an incident to regulation. Very clearly in that case the provisions of the ordinance in question were simply of a fiscal character, and for the purpose of replenishing the corporation treasury, and not regulations of police, prescribing and enforcing rules of action or conduct for the good order and benefit of society.

The case of *Commonwealth v. Stodder*, 2 Cush., 562, concerned a certain ordinance of the city of Boston relative to hacks, coaches, omnibuses, etc., requiring them to be licensed, and exacting in payment therefor from one to twenty-five dollars. This ordinance was passed under a provision of a statute entitled, "An act to prevent obstructions to the streets of cities, and to regulate hackney coaches and other vehicles," which provided that the mayor and aldermen of any city should "have power, from time to time, to make and adopt such rules and orders as to them shall appear necessary and expedient for the due regulation in such city of omnibuses, hackney coaches," etc., "used or employed wholly or in part in such city, whether by prescribing their routes and places of standing, or in any other manner whatsoever." The court held, first, that the exaction of money for a license was *unauthorized*; and, second, that as to persons residing out of the city, and running carriages into the city and back again, for the conveyance of passengers, there was no authority under the law to exact even the taking of a license.

In *Mays v. Cincinnati*, 1 Ohio St., 268, it was decided that "the sum demanded for a license to pursue an

employment, *when used as a means of supplying the public treasury*, is a tax on such employment." And also, that under an authorization "to prevent forestalling the markets, and huckstering therein," the city council could not embrace as hucksters persons not falling within the accepted meaning of that term. This is all there is of that case.

In *St. Louis v. Boatmans' Ins. Co.*, 47 Mo., 150, the court, while holding that where a city is simply authorized to license, it cannot also tax the licensee, said: "*The words 'to license' may imply the power to tax, when such is the manifest intention*, but, taken disconnected and alone, they will not generally confer that authority." In this case the power conferred by the charter was to license and tax grocers, horse railroad cars, hackney carriages, theatrical and other exhibitions, shows, and amusements, billiard tables, etc., and, in the same connection, simply to license insurance companies. The court was of opinion that these provisions being found in the same section showed that the mind of the lawgiver was directed to the subject, and that the power to tax was given where it was intended to be exercised, and that it was withheld where it was not so expressed.

In *Collins v. Louisville*, 2 B. Monroe, 184, the authority given to the city was: "To appoint measurers of lime, and coal, and wood, brought to the town for market, by land or water, and sold therein, and to affix a reasonable allowance to such measurer, and to make such regulations as may be necessary and proper for carrying the same into effect, and to inflict penalties for the breach of such regulations." It appears that under this authority it was ordained that the seller of coal brought to the city by water should pay a half cent per bushel for what was sold and delivered in carts, and a quarter of a cent for what was sold in bulk upon the boat. And the measurer was required to pay the

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proceeds of his measurements, less certain expenses, into the city treasury, and to receive for his compensation one-fourth of the amount collected. The court, very properly as we think, said that, from the ordinances and facts stated, it seemed too plain to admit of doubt that this was "a tax upon coal, not merely for the purpose of defraying the expenses of measurement, but principally and substantially for the purpose of raising revenue from that article, which, after paying the expenses of measurement, shall go into the general fund of the city. None of the ordinances contain the slightest evidence that, in fixing the price to be paid upon each bushel of coal measured or sold, any reference whatever is had to the actual or probable expense of measurement;" and held the exaction to be unwarranted.

In *Wendover v. The City of Lexington*, 15 B. Monroë, 258, it appeared that the legislature had authorized the corporate authorities to require "all lottery offices and agencies within the limits of the city to take out licenses," and to demand "for each license so issued a sum not exceeding one hundred dollars." In construing this statute, it was held that, as to lotteries for which the state had received no bonus in authorizing the scheme, such tax was lawful, but as to those for which a bonus had been received, it could not be sustained.

Mason v. Trustees of Lancaster, 4 Bush., 406. In this case it was simply decided that the trustees of Lancaster, being duly authorized by act of the legislature, might license taverns, and exact a tax therefor not exceeding two hundred dollars per annum, although they had paid for the same period both a United States and state license tax.

Kniper v. Louisville, 7 Bush., 599, is also one in which a delegated power was involved. It simply holds that

a power delegated to a city by the legislature must be strictly followed. Such is the rule which the courts generally apply. In this case it appeared that the city of Louisville, being authorized by its charter to require each brewer or distiller to take a license, and to exact not less than fifty, nor more than five hundred dollars therefor, and also "to grade, class, and fix the rate of license within the minimum and maximum amounts designated," passed an ordinance requiring brewers to pay one-tenth of one per cent on the amount of liquor manufactured, and that each one should pay at least fifteen dollars per annum. This ordinance was held to be invalid for the reason that the rate thereby established was not kept within the minimum and maximum amounts fixed by the legislature.

The case of *Youngblood v. Sexton* before referred to, on the question of uniformity, is cited upon the point we are now considering. It appears that the constitution of Michigan provided that "the legislature shall not pass any act authorizing the grant of license for the sale of ardent spirits or other intoxicating liquors." The court, in construing this provision, decided that the tax was not a license; that whether taxed or not, the traffic, not being prohibited, was legal. And, quoting from the language of Mr. Justice Manning in the case of *Chilvers v. The People*, 11 Mich., 43, the court said: "The object of a license is to confer a right that does not exist without a license." Within this definition, a mere tax upon the traffic, unless its payment confers some right that otherwise would not have existed, can in no sense be properly called a license. In this case it seems that the very act which imposed the tax repealed a prior law which forbade the traffic and declared it illegal.

Another case cited on this point is that of *Chilvers v. The People*, just referred to. The subject of con-

troversy in this case was an ordinance of the city of Detroit, by which ferries plying between that city and the Canada shore were charged twenty-five and fifty dollars, according to a specified scale, for license, and it was claimed against the ordinance that such exaction was taxation, and unconstitutional. But the court in its opinion said: "It is not a tax within the meaning of that term in the constitution. It is a price paid for a franchise, or public right vested in an individual." It is difficult to see how this case, especially, can be relied on to support the theory contended for, that licensing under our law is taxation, and within the operation of the constitutional provision above quoted.

In *State v. Hoboken*, 33 N. J. L., 280, the charter of Hoboken authorized the city "to regulate the building of vaults, and the laying of water and gas pipes in and under the streets." Under this authority an ordinance was passed, assessing applicants for the privilege of building vaults in front of their dwellings, a sum of money, and it was held not to be within the power conferred by the charter, nor within the usual police powers given to corporations for the maintenance of peace and good order, and was therefore void.

We have thus alluded, as briefly as practicable, to all the principal authorities cited in support of the claim that, within the purview of the constitution the money exacted for a license to traffic in intoxicating liquors, under our law, is a tax, and must therefore be imposed by a uniform rule. By turning to these cases it will be found that, with perhaps one or two exceptions, the question in each of them concerned the power of corporate authorities, under the charter or law by which they were governed, to require the payment of money for a license to engage in some particular business, or to do some particular thing otherwise prohibited, and made illegal. And the holding in each of

them but conforms to the general rule that, to justify such requirement, the power to make it must have been granted by the legislature to the corporation. And we think it will be further noticed that, although in several instances such exactions, where unauthorized, are regarded and spoken of as being in legal effect taxation, as they clearly are, *in not a single one* where the authority to impose them had been given are they held to fall within the general taxing power of the state, but within the ample power of police regulation, as was done in the above mentioned case of *Chilcvers v. The People*.

By the constitution of this state, the legislature, within certain specified inhibitions and limitations, is invested with full legislative power. And this power includes, as no one will deny, that of police regulation, which being neither defined nor specially limited, is practically left by the constitution to legislative discretion, so long as no right secured by that instrument is encroached upon. Taxation is also a legislative power, and is specifically mentioned in the constitution, but always in connection with the subject of revenue, for the support of the government generally, or some particular department or branch of it. And it is in such connection that we find the requirement of uniformity. This being so, we are led to conclude that this constitutional injunction has reference solely to taxation, pure and simple, according to the commonly accepted meaning of that term, for the purpose of revenue merely, and not those impositions made, incidentally, under the police power of the state, exerted either directly or by delegation, as a means of constraining and regulating what may be regarded as a pernicious or offensive act or business. And in this view we have the support of many adjudged cases, a few of which only will be referred to.

In *Baker v. The City of Cincinnati*, 11 Ohio State, 534,

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it is said that, "a charge for a license may be made in view of the special inconvenience and expense to the government for the benefit of the individual who asks for the license. Things licensed may be such as should only be permitted under the regulation or supervision of public functionaries. The tax or charge may have reference to such regulation, or supervision. * * * The burden thus devolved on public officials, requiring perhaps an increase of their number, or compensation, * * * may justly authorize a charge beyond the mere expense of filling up a blank license."

And in *Thompson v. The State*, 15 Ind., 449, it was decided that a license fee of fifty dollars for the sale of liquor, was not a tax within the meaning of the constitutional provision requiring a uniform rate of taxation, which related to the general levy alone. In the words of the opinion: "Taxation was not the object of imposing it" (the license fee) "and the legislature was not bound to appropriate the proceeds to any object for which the state is forbidden to raise money by local or special taxation. It was imposed in the exercise of the rightful police power of the state, and is an incident of a legitimate police regulation. Hence it is not within the prohibition * * * of the constitution," against "local and special taxation for state purposes." To the same effect is *The Bank v. The City of New Albany*, 11 Ind., 139.

The Board of Trustees of Falmouth v. Watson, 5 Bush., 660, is an instructive case on this point. It appears that, by legislative grant, the board of trustees of Falmouth were given "the exclusive control and right to grant licenses for the sale, by retail, of all spirituous, vinous, and malt liquors within said town, or within one mile of said town," and the sale of such liquors without such license was prohibited. It was contended that the statute conferring this power upon the trustees,

so far as it authorized the exaction of a license fee outside of the town, was within the interdiction of a clause of the state constitution, which provided that no man's property should "be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." The court said: "Had the exercise of the power complained of been the imposition of an ordinary tax merely on the property of the appellee, situate without the corporate limits of the town, for municipal purposes, we should not doubt the correctness of the objection; or even if the exaction of the sum in controversy, in consideration of a trade license, had been made for local revenue purposes alone, though not in the usual form of taxation, we should regard it as within the constitutional prohibition; for the legislature could not delegate to the corporation the right to either license for a compensation or tax a privilege to be enjoyed beyond its limits, except as a police regulation, having reference to the comfort, safety, and welfare of society within its local jurisdiction. But in our opinion the exaction of a fee of one hundred dollars for the privilege of vending ardent spirits, in such proximity to the town as to render its exercise liable to affect the good order or peace of the local community, did not infringe any constitutional right of the appellee. The privilege granted to him was one which public policy requires should be subjected to such legal restraints and regulations as will, as far as practicable, prevent its abuse to the detriment of society. The legislature having the power to do this, properly delegated that power to the local government of the community immediately interested."

In the case of *The People v. Thurber*, 13 Ill., 554, the court, in considering the effect of a provision of the constitution of that state which requires that the mode

of levying taxes should be by valuation, "so that every person shall pay a tax in proportion to the valuation of the property which he or she may have in his or her possession," and whether it applied to a certain license law, said: "It has never been doubted that the word *tax* as here used means the tax which is imposed on a person on account of the property which he has, and has never been held to deprive the legislature of the power to inhibit persons from exercising certain callings, franchises, or privileges without a license or authority for so doing, which they may withhold entirely, or until pecuniary compensation shall be paid into either the state, or some town, city, or county treasury." And in *City of East St. Louis v. Wehrung*, 46 Id., 392, it is said to be settled that "a license is not a tax in the constitutional meaning of that term." These cases seem to be directly in point, that a license fee proper is not a tax as ordinarily understood.

In *Anderson v. The Kerns Draining Co.*, 14 Ind., 199, the court, in construing a constitutional provision which declared that the legislature shall provide for a "uniform and equal rate of assessment and taxation," held that it did not apply to certain local taxes levied for draining purposes, and said that "it did not prohibit indirect taxation by way of licenses upon particular pursuits. Such indirect taxation may be made effectual as a police regulation." And in *Bright v. McCullough, Treas., etc.*, 27 Id., 223, it is said that this constitutional provision is a "restriction upon the otherwise discretionary powers of the legislature, and prescribes the rule for its government in authorizing the levy of taxes, and it must be governed by that rule, whether the levy be for the state at large, or for a minor subdivision. Indirect taxes, imposed not merely for the purposes of revenue, but in a restraint of a particular business or calling, or as a license on particular

pursuits, or as a mere police regulation, do not come within the spirit or meaning of the provision of the constitution referred to." To the same effect are *Commissioners of Ottawa Co. v. Nelson*, 27 Am. Repts., 101, and *Ash v. The People*, 11 Mich., 847.

Many other cases of like import are at hand and might be referred to, but these are enough to show that the idea of a license fee or imposition not being within the ordinary or constitutional signification of the word "tax" is no new doctrine evolved now for the first time by this court to meet an exigency of this case, but that it is a well understood rule which the courts have constantly applied in dealing with questions similar to the one we are now considering. To our minds it is clear that the restriction relied on has no proper application to this case, and that the authority given by the act regulating the sale of spirituous liquors, is but a proper exercise of the police power of the state, of which, by the constitution, the legislature is made the sole custodian and dispenser, and not an exercise of the power of taxation. That regulation of a traffic, believed by the legislature to be pernicious in its effects upon society, and not the raising of revenue merely, is the chief design of the act, it would seem no man of intelligence can doubt, who reads it. It will be seen that a license cannot go out, as a matter of course, to whoever may apply, on payment of the required fee, but only when "deemed expedient" by the officers having the matter in charge, and on "the application by petition of thirty resident freeholders of * * * the precinct where the sale of such liquor is proposed to take place, setting forth that the applicant is a man of respectable character and standing, and a resident of this state, and praying that a license may be issued to him." Sec. 1 of the act, chap. 50, Comp. Statutes, 333.

Section two provides that before any action shall be taken on such application at least two weeks notice must be given, "when, if there be no objection in writing made and filed * * * and all other provisions" (of the law) "have been fully complied with, it may be granted." If, however, there be any objection or protest filed, a hearing for the determination of the matter is provided for by the next two sections, and if it be proved that the applicant has violated any provision of the act within the space of one year, or that any former license to him has been revoked for any misdemeanor against the laws of this state, then the license shall be refused. Section six provides that before the license shall be granted the applicant must give a bond to the state with sureties in the penal sum of five thousand dollars, "conditioned that he will not violate any of the provisions of this act, and that he will pay all damages, fines, and penalties, and forfeitures which may be adjudged against him under provisions of this act."

Among the more prominent matters of regulation we find that by section eight, "Every person licensed as herein provided, who shall give or sell * * any intoxicating drinks to any minor, apprentice, or servant, under twenty-one years of age, shall forfeit and pay for each offense the sum of twenty-five dollars." By section ten, the sale to Indians, insane persons, idiots, and habitual drunkards, is prohibited under a penalty of fifty dollars. Section eleven provides that "All persons who shall sell or give away upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks, without having first complied with the provisions of this act, and obtained a license as herein set forth, shall for each offense be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars,

and not more than five hundred dollars, or be imprisoned not to exceed one month in the county jail, and shall be liable in all respects to the public and to individuals, the same as he would have been had he given bond and obtained license as herein provided." Section thirteen prohibits the sale of adulterated liquors, and provides a penalty of one hundred dollars for each offense. Section fourteen prohibits the sale or giving away of such liquors on election days and Sundays, under a penalty of one hundred dollars for each offense. Section fifteen provides that "The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic; he shall support all paupers, widows, and orphans, and the expenses of all civil and criminal prosecutions growing out of, or justly attributed to his traffic in intoxicating drinks." Section seventeen gives a right of action to counties and cities for the support of persons pauperized by intoxication, against those causing it by the sale or gift of liquor. Section twenty-nine makes it the duty of venders "of malt, spirituous, or vinous liquors, under the provisions of this act, to keep the windows and doors of their respective places of business unobstructed by screens, blinds, paint, or other articles," and the failure to do so is made a misdemeanor, subjecting the offender to a fine of not less than twenty-five dollars, or imprisonment in the county jail not less than ten days, or both, at the discretion of the court, and the forfeiture of his license.

There are other matters of regulation in this act, but these will answer our present purpose, which is to show that, although a large license fee is required, the conclusion is irresistible, that the leading motive of the legislature in enacting the law could not have been the raising of revenue, but rather to thoroughly regulate, and as far as practicable suppress a traffic, the

tendency of which was believed to be productive of pauperism, vice, misery, and crime, to the great injury of the people of the state at large, and especially of the particular locality where it is carried on. If revenue merely from such traffic, and not regulation, had been the object of this law, it is not at all probable that those desiring to engage in it would have been met by the many discouraging embarrassments which are here thrown in their way.

It is further claimed that the constitution is violated by sec. 4 of the act, in providing for an appeal to the district court from the decision of the county board. As we understand this provision, an appeal is allowed only from a decision of the board upon the question of whether the applicant for a license has been guilty of a violation of any of the provisions of the act within one year; or whether any former license issued to him has been revoked for a misdemeanor against the laws of this state, and not from their decision as to the advisability of licensing the traffic at all. The determination of this latter question seems to be left by the first section to the sole discretion of the board of commissioners in counties, and to the municipal authorities in cities and villages.

Another objection urged to this law is that sec. 18 is a violation of sec. 6, art. I of the constitution, which guarantees the right of trial by jury. We fail to see any merit in this point. The section complained of simply provides what effect may be given to certain evidence in fixing responsibility for injurious results of intoxication. We think it is competent for the legislature to do this, upon the same principle that statutory effect is given to various kinds of evidence, such as historical works, books of science or art, entries, and other writings of persons deceased, books of account, notarial protests, etc. It is certainly not an un-

usual exercise of power by the legislature, and as to it we know of no constitutional restriction. The effect of this provision is nothing more than an assertion of what shall be sufficient, if proved to the satisfaction of the court, to make out a *prima facie* case. No decision is cited by counsel and we know of none which sustains them in the position taken.

Still another ground of alleged unconstitutionality in this law is, that sec. 28 confers upon justices of the peace the pardoning power, whereas by sec. 13, art. V of the constitution, it can be rightfully exercised only by the governor of the state. The section in question makes intoxication a misdemeanor, and affixes as punishment therefor a fine of ten dollars and costs of prosecution, or imprisonment in the county jail not exceeding thirty days. And it provides that the magistrate before whom a conviction is had may remit any portion of such penalty and "order the prisoner to be discharged upon his giving information, under oath, stating when, where, and of whom he received the liquor which produced the intoxication, and the name and character of the liquor obtained."

In the first place we do not think that the authority here conferred can properly be classed as a pardoning power. It is not of the character of that given by the constitution to the chief magistrate of the state. It is a provision of the law excusing an act which it makes a misdemeanor, upon clearly specified conditions. Without these conditions are strictly complied with, the magistrate has no power to relieve the accused from any part of the penalty. One requirement is substituted for another. Not so, however, in the case of pardon under the provision of the constitution. In that, full power is given to the governor, and he may exercise it in his discretion, and for such reasons as to him may seem sufficient. To be pardoned, in the

Pleuler v. The State.

proper sense of the term, is not a right given for a consideration to the individual by the legislature, but a free gift from the supreme authority, confided to the chief magistrate, and to be bestowed according to his own discretion.

The only remaining ground of constitutional objection to the law is, that it arbitrarily prohibits the sale of liquors within a strip of two miles around an incorporated city or village, while it may be licensed both within and without that limit. This provision violates no command of the constitution. It is general in its application to all territory of the state falling within such description, and is but an exercise of the police power intrusted to the legislature. It is referable to that principle which enables the legislature to prohibit liquor selling on Sundays and on days of elections, or within the vicinity of fairs, camp-meetings, and other gatherings of the people. It is the power exerted by the legislature of Kentucky, and recognized in *Board of Trustees of Falmouth v. Watson*, ante, in the provision that persons engaged in the retail of spirituous liquors within one mile of an incorporated town must have a license to do so from the proper officers thereof, although already licensed by the county authorities under another general law of the state.

The only remaining objection to the judgment to be noticed is, the alleged error of the court in ruling from the jury the license issued to the prisoner under a *a priori* statute, since repealed. It is conceded by counsel, and so the law is, that it is competent for the legislature to revoke a privilege given by a license. The citation of authorities is unnecessary on this point. But it is contended, very strenuously, that the rejected license had not been annulled, and that therefore it ought to have been admitted as a complete defense to the charge against the accused.

But was it the intention of the legislature, by the repeal of the old law and the enactment of a new one, to revoke unexpired licenses? The answer to this question must be found in the new law, by which the repeal was effected, and under which this prosecution originated. Looking to it, we find, first, that the repeal was absolute, and without saving terms, which, in all probability, would not have been entirely omitted had it been intended to preserve existing license privileges. While it may be conceded, as is claimed by counsel, that this omission of an affirmative saving provision will not of itself warrant us in holding that the legislature, by the mere repeal of the former law, intended the revocation of such privileges, we do find in the body of the new law satisfactory evidence of such intention. It is provided by sec. 11 that "All persons who shall sell or give away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks, *without having first complied with the provisions of this act, and obtained a license as herein set forth*, shall, for each offense, be deemed guilty of a misdemeanor," etc.

This act, as we have seen, went into operation on the first day of June, 1881, and by the above provision the entire traffic is, by the most expressive language, absolutely prohibited, except by persons "having first complied with the provisions of"—not some other law, but of—"this act." Now suppose, for instance, that the traffic had been prohibited as above, without any provision for its legalization by the procurement of a license, would any one contend that effect could be given to an authority granted under a prior statute? Very clearly not. So we say that, the prohibition being absolute, except upon certain specified conditions, those conditions must be observed or the traffic is illegal. We see no escape from this conclusion.

We have now carefully considered all of the objec-

 Fitzgerald v. The State.

tions urged to the enforcement of this law, and find them to be untenable. Were we acting in the capacity of law-makers, if our business were to determine what the law should be instead of what it is, possibly as to the point last noticed, and perhaps some others, we might believe it best to withhold our assent until some important modifications were made. We might insist that privileges granted through former licenses should be protected, or at least not entirely disregarded by the new law; and also that a material distinction be made in the amounts required from persons selling all kinds of intoxicating liquors, and those selling ale or beer alone. But these are matters purely of governmental policy, intrusted by the constitution exclusively to the legislative department of the government, and with which the judiciary have not the slightest concern, so long as no right secured by the paramount law is invaded, except, when appealed to, to uphold and enforce the properly expressed will of the law-making power. This is a constitutional and valid law.

JUDGMENT AFFIRMED.

**MAURICE FITZGERALD, PLAINTIFF IN ERROR, V. THE
STATE OF NEBRASKA, DEFENDANT IN ERROR.**

Evidence: DYING DECLARATIONS. Dying declarations, to be admissible in evidence, must be made under a sense of impending death. But it is unnecessary that the deceased should have stated at the time of making the same that he was about to die. It is sufficient if this state of mind appears from other testimony.

ERROR to the district court for Cass county. Tried below before POUND, J.

11	577
46	42
11	577
45	280

Sam M. Chapman, Willet Pottinger and T. M. Marquett, for the plaintiff in error.

No brief on file.

C. J. Dilworth, Attorney General, for the state, cited 1 Greenleaf on Evidence, 158. *State v. Wilson*, 24 Kan., 189. Hill's case, 2 Gratt., 607. *Dunn v. State*, 3 Pike, 229. *Moore v. State*, 12 Ala., 764. *Starkey v. People*, 17 Ill., 17. *Brookfield v. State*, 1 Sneed, 215. *Robbins v. State*, 8 O. S., 138, 163. *Kilpatrick v. Comm.*, 7 Casey, 199. *Young v. Comm.*, 6 Bush, Ky., 313.

MAXWELL, CH. J.

The plaintiff was indicted for the murder of Daniel McNeill, and convicted of manslaughter, and sentenced to imprisonment in the penitentiary for ten years. He now prosecutes a writ of error to this court. A large number of errors are assigned, but one of which will be considered.

Objection is made to the admission of the dying declaration of Daniel McNeill as evidence, upon the ground that it does not appear that he had given up all hope of living at the time he made the same. From necessity, the dying declaration of a deceased person is admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration. The rule is based on the presumption that in a majority of cases there will be no other equal or as satisfactory proof of the same facts. And in many cases it would be impossible otherwise to fix the actual commission of the crime. But the fact that it is hearsay evidence; that there is no opportunity for cross-examination by the parties against whom it is offered,

that it may have been made under a feeling of injury or resentment and a desire to place the worst possible construction upon the conduct of the accused, and that he has no opportunity to ask questions tending to extenuate his conduct, render it necessary that such declaration should be received only in cases where a sufficient foundation has been laid. As a condition precedent to the admission of such declaration therefore, it must be made to appear to the court that it was made under a sense of *impending death*. But the deceased need not state at the time of making the same that in his opinion he was about to die. Nor does the time which elapses between the time the declaration was made and the death of the declarant become material, provided that at the time the declaration was made he believed he was about to die. The test seems to be, was the declaration made under a sense of *impending death*? If so the declaration is admissible the solemnity of the occasion being considered by the law as creating an obligation equal to that imposed by an oath in court. In the case at bar the fatal wound was given on the eighteenth of December, 1878, and death occurred on the first of January, 1879, and the dying declaration was made on the nineteenth of December, 1878. Dr. Root testified that on the day of the shooting he was called to examine McNeill and found him in a prostrate condition and entirely pulseless, so far as he could perceive. John McNeill testified that about two hours before the declaration was made the deceased asked for a drink of water, when he told him he better not drink too much cold water. The deceased then said "he could not live but a little while, and he wanted one good drink." Thomas McNeill testified to the same facts. Allen McNeill testified that about ten o'clock on the night after the shooting occurred, the deceased stated to him and

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also to his mother "he could not live but a little longer." It appears that afterwards and on the day preceding his death, the deceased expressed a hope that he might recover. The testimony shows that the wound was regarded from the first as being mortal, and that the deceased at the time the declaration was made regarded it as such. We think sufficient proof was offered to show that the declaration was made under a sense of impending death. It is not necessary that the deceased should have declared such to be the case at the time he made the declaration, but that fact may be proved by circumstances as in other cases. There is a substantial agreement between the dying declaration of McNeill and the testimony of the plaintiff. And in our opinion the proof would have warranted the jury in returning a verdict of murder in the second degree. It is unnecessary to consider the other errors assigned, even if they were well sustained; they are not of a character to justify the reversal of the judgment. As there is no substantial error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

GEORGE A. HOAGLAND, PLAINTIFF IN ERROR, v. JOHN H. ERCK, DEFENDANT IN ERROR.

Negotiable Instruments: CONDITIONAL ACCEPTANCE. An order read as follows: "John H Erck, Esq., Omaha, Nebraska: Sir—Please pay to Geo. A. Hoagland or order, six hundred and thirty-five dollars, out of amount due me on contract for the erection of your store building, when due," which was accepted. *Held*, First, a conditional order. Second, that no recovery could be had thereon unless the acceptor was then or thereafter indebted to Randall, he having failed to complete the building.

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ERROR to the district court for Douglas county.
Tried below before SAVAGE, J.

Kennedy & Gilbert and *George W. Doane*, for plaintiff
in error.

J. C. Cowin, for defendant in error.

MAXWELL, CH. J.

This is an action upon the following instrument:

“February 9th, 1877.

“JOHN H. ERCK, ESQ., OMAHA, NEB., SIR:

“Please pay to Geo. H. Hoagland, or order, six hundred and thirty-five (\$635) dollars out of amount due me on contract for erection of your store building when due.

“J. B. RANDALL, Contractor.”

On the face of the instrument are these words:

“Accepted.

JOHN H. ERCK.”

The defendant in his answer admits the execution and acceptance of the order, but alleges that at the time he accepted the same he did not owe said Randall any amount whatever, and that after said acceptance Randall abandoned the contract for building and failed in business; and that at no time after said acceptance did he owe said Randall any sum whatever. On the trial of the cause in the district court judgment was rendered in favor of the defendant. The plaintiff brings the cause into this court by petition in error.

It appears from the record that Randall was erecting a store building for Erck at the time this order was accepted; that about that time he ceased work thereon, and in April of that year went into bankruptcy, and that he failed to complete the building.

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The order is not absolute, but was to be paid when the amount was due on the contract. The question to be determined therefore is, does the testimony show that Erck was indebted to Randall at the time or after this order was accepted? We think it fails to show such to be the case. It is unnecessary to recapitulate the testimony, which is quite voluminous. In our opinion it fully sustains the judgment. Even if the plaintiff had taken the necessary steps to perfect a mechanic's lien for material furnished a contractor, he could not as the law then stood have recovered against the defendant unless he was indebted to Randall. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

11	582
13	537
15	499
16	195
16	200
11	562
30	473

DAVID B. HOWARD, R. H. OAKLEY, AND SAMUEL G. OWEN, PLAINTIFFS IN ERROR, V. JOSEPH E. LAMASTER, DEFENDANT IN ERROR.

1. **Tax Deed.** If a tax deed fails to show that the tax sale was made at the place required by law the deed is void.
2. **Practice in Supreme Court.** In an action of ejectment where the plaintiff in his reply pleaded a tender of the amount paid by the defendant for taxes due on the premises, but the court on the trial excluded proof of the amount, *held*, That the judgment in ejectment being right, the supreme court will order a reference to ascertain the amount due for taxes, and require the payment of the same as a condition of affirming the judgment.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Harwood & Ames, for plaintiff in error. The omitted recital in the deed is not one of a jurisdictional

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fact, and the instrument is *prima facie* valid. MAXWELL, CH. J., dissenting in *Haller v. Blaco*, 10 Neb., 36. *Scott v. Pleasants*, 21 Ark., 370. *Hurlbut v. Dyer*, 36 Iowa, 474. *Bowman v. Cockrell*, 6 Kans., 311. *Elbridge v. Kuehl*, 27 Iowa, 160.

A. C. Ricketts, for defendant in error, cited *Haller v. Blaco*, 10 Neb., 36. *McCore v. Brown*, 11 How., 414. *Cooley on Taxation*, 338. *Lain v. Cooks*, 15 Wis., 446. *Blackwell on Tax Titles*, 571, 580.

MAXWELL, CH. J.

This is an action of ejectment to recover the possession of lot 10 in block 96 in the city of Lincoln. The answer consists first, of a general denial; second, it is alleged in substance that the premises in controversy were sold in September, 1874, for the taxes of 1873, being the sum of \$11.00, to Geo. E. Church, and that afterwards on the 20th day of October, 1876, no one having redeemed said real estate from tax sale, and the tax certificate having been assigned to Alice A. Church, was by her presented and surrendered to the treasurer of said county, who thereupon made and delivered to her a tax deed for said premises, which on the 2d day of November, 1876, was duly recorded; that the defendants have paid the taxes assessed on said property for the years 1874, 1875, 1876, 1877, and 1878, amounting in all to \$64.45, no part of which has been paid; and that prior to the commencement of the action Geo. E. Church and Alice A. Church conveyed to R. H. Oakley and S. G. Owen, who were in possession and have made valuable improvements on said premises. The reply consists first of a general denial, second, it is alleged in substance that the tax proceedings were void, and that the plaintiff in the court below, prior to the commencement of the action, tendered the

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full amount of taxes, etc., and now offers to pay the same. A verdict was rendered in the court below in favor of Lamaster. Oakley and Owen bring the cause into this court by petition in error.

The defendants in the court below offered in evidence the tax deed for the real estate in controversy, which was objected to upon the ground that it did "not show on its face where the land was sold." The objection was sustained and the deed excluded. This is assigned for error.

In *Haller v. Blaco*, 10 Neb., 36, it was held that if a tax deed failed to show that the tax sale was made at the place required by law the deed was void. In other words, the sale being made under a naked statutory power it must appear on the face of the deed that the conditions required by the statute have been complied with. Such being the case the deed was properly excluded; and the exclusion of the deed is fatal to the claim of title of the plaintiffs in error.

Lamaster pleads in his reply that he had tendered the amount paid for the taxes upon the lot in controversy, and that he is now ready to pay the same. But when the defendants in the court below offered to prove the amount paid, objection was made and the testimony excluded. In this there was error under the issue made by the pleadings. But inasmuch as the judgment in ejectment in favor of Lamaster is right the error will be corrected in this court. The case will be referred to the clerk to take testimony, and report the amount due with twelve per cent interest, which amount Lamaster is required to pay to said clerk within thirty days from the confirmation of the report for the use and benefit of Oakley and Owen, upon the payment of which the judgment of the court below will be affirmed.

JUDGMENT ACCORDINGLY.

THE FREMONT, ELKHORN & MISSOURI VALLEY R. R.
COMPANY, PLAINTIFF IN ERROR, V. W. D. WHALEN,
DEFENDANT IN ERROR.

1. **Railroad: RIGHT OF WAY: DAMAGES.** Where land is condemned for railroad purposes the owner is entitled to have as one item of damage, in all cases, the fair market value of the part actually taken. And where a portion of the tract remains, if it can be said with reasonable certainty that the road, properly constructed and carefully operated, will injure it, he is also entitled to recover for that. But injuries merely speculative and contingent upon the improper construction or negligent operation of the road are too remote and uncertain to be considered.
2. ———: ———: **SPECIAL BENEFITS.** Special benefits may go to reduce the damages to what remains of the land, but cannot be set off against the value of the part taken.
3. ———: ———: **OPINION OF WITNESSES.** Witnesses should not be permitted to express their opinions before the jury of the value of the land, *subject to the right of way*. This should be left to the jury to ascertain from facts affecting the value, and proper to be considered, uninfluenced by the opinion of others.

ERROR to the district court for Stanton county, the cause having been brought there on appeal by Whalen from an assessment of damages in the sum of \$191, made in the county court in his favor, on account of the location of the railroad over certain land owned by said Whalen. Trial before BARNES, J., and a jury, with verdict and judgment against the railroad for \$892.11.

Joy & Wright, for plaintiff in error, cited *Tufts v. City of Charleston*, 4 Gray, 539. *Robb v. Maysville*, 3 Met. (Ky.), 117. *Penn. R. R. v. Bushnell*, 81 Penn. State, 144. *Central Pacific v. Pearson*, 35 Cal., 347. *Wagner v. Gage County*, 3 Neb., 237. *Todd v. Kanka-*

11	585
11	593
11	597
13	487
14	472
15	228
16	288
11	585
35	547
11	585
38	167
11	585
30	636
11	585
35	619
11	585
38	431
11	585
44	722

F. E. & M. V. R. R. Co. v. Whalen.

kee, 78 Ill., 530. *Shepley v. Baltimore R. R.*, 34 Md., 336. *Saint Paul R. R. v. Mattheos*, 16 Minn., 341. *Lyon and wife v. G. B. & M. R. R.*, 42 Wis., 538. *King v. Iowa Midland R. R. Co.*, 34 Iowa, 453. *Isom v. Miss. R. R. Co.*, 36 Miss., 300. *Presbrey v. Old Col. & N. R. R. Co.*, 103 Mass., 6. *Proprietors Locks and Canals v. N. & L. R. R. Co.*, 10 Cush., 388. *Alabama & Florida R. R. v. Buckett*, 46 Ala., 569. *In matter of U. V. & Johnsonville R. R. Co.*, 53 Barb., 457. *Sunbury & E. R. R. Co. v. Humwell*, 27 Penn. St., 99. *Lehigh Valley R. R. Co. v. Lazarus*, 28 Penn. St., 203. *Patton v. N. C. R. R. Co.*, 33 Id., 426. *Hooker v. New H. & Northampton R. R. Co.*, 14 Conn., 146. *Kramer v. C. P. R. R. Co.*, 5 Ohio St., 140. *C. P. R. R. Co. v. Simpson*, 5 Ohio St., 251. *Wilson v. R. R. I. & St. L. R. R.*, 59 Ill., 274. *Hayes v. O. O. F. R., etc., R. R.*, 54 Ill., 373. *Meacham v. Fitchburg R. R.*, 4 Cush., 291. *Jones v. W. V. R. R.*, 30 Ga., 43.

H. C. Brome and J. A. Ehrhardt, for defendant in error, cited *Mills on Eminent Domain*, 159, 169. *Howard v. Providence*, 6 R. I., 514. *Whitman v. Boston R. R.*, 7 Allen, 313. *Buffum v. New York R. R.*, 4 R. I., 221. *Rondout v. Deyo*, 5 Lans., 298. *Newby v. Platte County*, 25 Mo., 258. *White v. Charlotte R. R.*, 6 Rich. L., 47. *Young v. Harrison*, 17 Ga., 30. *Cortes v. St. Paul R. R.*, 10 Minn., 28. *Bangor R. R. v. McComb*, 60 Me., 290. *Pittsburg R. R. v. Rose*, 74 Pa., 362. *Atchison R. R. v. Blackshire*, 10 Kan., 477. *St. Louis R. R. v. Teters*, 68 Ill., 144. *Wilson v. Rockford R. R.*, 59 Ill., 273. *Field on Corporations*, 514, 515, secs. 449, 450. *San Francisco R. R. v. Caldwell*, 31 Cal., 367. *Matter of Utica R. R.*, 56 Barb., 456. *Penn. R. R. v. Bonnell*, 81 Pa., 414. *Selma R. R. v. Keith*, 53 Ga., 178. *Sidener v. Essex*, 22 Ind., 201. *Chicago R. R. v. Stein*, 75 Ill., 41. *Bigelow v. Wisconsin R. R. Co.*,

27 Wis., 478. *Gear v. Railroad*, 39 Iowa, 23. *Simmons v. St. Paul R. R. Co.*, 18 Minn., 184. *Virginia R. R. v. Henry*, 8 Nev., 165. *Putnam v. Douglas County*, 6 Oreg., 328.

LAKE, J.

The first error complained of is, that the damages found by the jury were not warranted by the evidence. If all of the evidence submitted to the jury, and which by the instruction of the judge they were required to consider in making up their verdict, had been competent, this objection to the finding would have been without merit, but for the reasons we shall give in considering another branch of the case, we are of opinion that it is well taken.

The second and third errors assigned are of like import, and need not be separately considered.

The fourth error assigned is, "That the court erred, over the objection of the defendant company, in permitting the introduction of the testimony by plaintiff in the court below of the witnesses James McKinney," and others, "upon the matter and question of value of real estate and damages sustained in the location of said road." This objection is too general. Much of the testimony of each of these witnesses was clearly admissible upon the questions here referred to; therefore, to avail, the objection should have specified the particular portion aimed at, as, by giving the number of the question or answer supposed to have been improperly admitted.

The fifth and sixth assignments have the same defect, and will not be further noticed.

The seventh, eighth, and ninth errors assigned pertain to the judge's charge. The instructions particularly complained of are the third, fourth, and fifth, as

numbered in the record. These are all devoted to one subject, the rule of damages by which the jury were to be guided in making up their verdict. By them, in very general terms, the jury were in substance told that, in estimating the damages to which the owner of the land was entitled, they should from all the evidence before them ascertain the fair market value of the land at the time of the condemnation of the portion taken for right of way. This done, they should next find from all the evidence the market value of the tract with the right of way carved out of it, excluding from their consideration all incidental benefits which might be supposed to flow to the public from the building of the road, and if the market value so ascertained, "immediately after and on the carving out of said right of way therefrom, was equal to or greater than it was immediately before the taking of said right of way," then no damages should be awarded; but if they found the value of the tract to be less with the right of way taken than it was before, the difference would be the true measure of damages.

The rule of compensation for right of way here laid down is clearly erroneous. It not only states the law incorrectly, but seems to have been given without much, if any, regard to the evidence which the jury were to consider. For instance, there was no evidence whatever tending to show that the land, after the condemnation for right of way, "was equal to or greater than it was immediately before," so that it was impossible for the jury to so find, and their minds ought not to have been incumbered, if not confused, by a question not properly before them. But even if there had been evidence of the character implied by this portion of the charge, still the owner of the land would have been entitled to damages equal to the value of the portion appropriated to the purposes of the road. It is

true that this particular part of the judge's charge could not have prejudiced the railroad company if properly understood by the jury, and if the instruction to return no damages in a certain contingency were the only fault, the verdict would not be disturbed at the instance of the present plaintiff in error.

As before stated the charge was in general terms. It failed almost entirely to instruct the jurors as to their duties under the law. It is true they were told to find the respective values of the land before and after the condemnation, but there was no allusion whatever to the proper mode of doing so, which, in view of certain testimony before them, we consider a very important omission. As to the value before the right of way was taken, doubtless the jury would have had no difficulty in reaching a just result without any instruction at all, but not so as to the subsequent value. This, in the estimation of the witnesses for the defendant in error, was lessened by the location of the road from three to eight dollars per acre. But, as clearly brought out by the cross-examination of these witnesses, this depreciation was caused chiefly by merely speculative considerations which had no proper place in the estimate, and which ought to have been excluded from the jury. For instance, the cross-examination disclosed that, aside from the value of the land taken for the right of way, which was about ten acres, and worth, according to the very highest estimate, not to exceed twenty dollars per acre, the chief ingredient of damages were the supposed inadequacy of a certain culvert, in case of unusually high water, whereby a portion of the land might be flooded; the liability of stock to be killed by getting upon the track; the possibility of destruction of property by fires started by passing trains; and the inconvenience of being compelled to go an unreasonable distance in getting from

one portion of the farm to the other, there being but a single track crossing, and that perhaps not very conveniently located, according to the testimony of some of the principal witnesses.

The damages based upon the supposed insufficiency of the culvert, and the possible destruction of property by fire and otherwise through the carelessness of the company's agents in operating the road, were too uncertain and remote to be taken into the estimate, and valuations of the land based in part thereon were entitled to no weight with the jury. *King v. Iowa Midland R. R. Co.*, 34 Iowa, 455. *Lehigh Valley R. R. Co. v. Lazarus*, 28 Penn. St., 203. *Patton v. N. C. R. R. Co.*, 33 Id., 426. *Fleming v. C. D. & M. R. R. Co.*, 34 Ia., 353. Damages to be paid by the company upon the condemnation do not cover those caused by injuries resulting from negligence or unskillfulness in either the construction or operation of the road. *Delaware, Lackawanna & Western R. R. Co. v. Salman*, 23 Am. Repts., 214, 10 Vroom, 299. And even if they were in fact included in the assessment, their payment would be no bar to future actions brought for such injuries. The damages for which the law provides, and proper to be included in the assessment for right of way, are simply those which it can be said with reasonable certainty the owner of the land will sustain by reason of its appropriation; in other words such damages as are necessarily incident to the proper construction and careful management of the road, leaving injuries resulting from negligence to be compensated for by action whenever they occur. *Id.*

In submitting such assessments to the decision of juries it is of the utmost importance that they be given clearly to understand the rules by which they must be governed in making them. And they should be plainly told by the judge what elements of damage the partic-

ular case presents, and which are proper to be considered in fixing the amount to be returned by their verdict. To say to the jury merely, that they are to allow the difference between the value of the land before the road was laid through it, and its value afterwards, is little if any better than no instruction at all, for they are left practically without guide, and to uncertain conjecture as to the elements affecting the subsequent value.

As before stated, the owner of the land is entitled to recover, in any event, as one item of damage, the fair value of the portion actually taken. *Wagner v. Gage County*, 8 Neb., 237. And in addition to this, he should have allowed to him a reasonable compensation for whatever damage the evidence shows must necessarily be done to the residue of the tract from the proper construction and future careful operation of the road. Where the evidence shows that the landowner will be specially benefited by the location of the road, such benefit may go to reduce the damages to the residue of the land, but cannot be set off against the value of the part actually taken. But those benefits which are common, and shared in by others as well, cannot be considered to reduce his damages.

The practice indulged in on the trial of this and other cases, of taking the opinion of witnesses as to the value of the land, subject to the location of the road over it, ought not to be permitted. A strong objection to it lies in the fact that, indirectly, the damages are assessed by the witnesses, instead of the jury, whose duty it is, and most likely on an improper basis. It is doubtless a proper course to take the opinion of experts as to the value before it is affected by the location of the road. This done, the testimony on the question of damages should be confined to those matters affecting the value, proper to be considered, leav-

ing the jury to draw their own inferences therefrom, unaffected by the judgment of others.

For these reasons the judgment must be reversed, and a new trial awarded.

REVERSED AND REMANDED.

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THE FREMONT, ELKHORN & MISSOURI VALLEY R. R. Co.,
PLAINTIFF IN ERROR, v. C. L. LAMB, DEFENDANT IN
ERROR.

SAME v. THE SAME.

1. **Railroad: RIGHT OF WAY: DAMAGES.** Damages incident to the taking of land for right of way for a railroad, and for which compensation must be made to the owner, independently of the portion actually appropriated, are the result of facts and circumstances susceptible of proof, and they must be proved before the damages are allowed.
2. **Railroad Companies Required to Fence Track.** By the law of this state railroad companies are required to fence their track against stock running at large, and failing to do so, are liable to the owner of any that may be killed or injured in consequence of the omission.
3. **Track Crossings.** And when requested by the owner of land crossed by the road, the company are required to make and keep in good repair an adequate means of crossing the track.

ERROR to the district court for Stanton County.

Joy & Wright for plaintiff in error.

H. C. Brome and *John A. Ehrhardt* for defendant in error.

LAKE, J.

The questions presented by the records in these two cases are in all respects the same as we have already considered at this term, in the case of *The Fremont*,

Elkhorn & Missouri R. R. v. Whalen, ante p. 585. The course pursued in the examination of witnesses to prove damages by reason of the location of the road, and the character of the testimony, were not materially different. The instructions given to the jury in the three cases were identical. It is unnecessary, therefore, to go over the ground covered by the opinion in the Whalen case, as we have nothing material to add to what is there said.

However, as a fair sample of the evidence which the jury were particularly instructed to consider on the question of damages, we will give the direct examination of a witness in each of these two cases in full. In the first case, in their numerical order, H. C. Davis was called by the defendant in error, and testified as follows:

Q. Are you acquainted with the value of lands in Stanton county—the fair market value?

A. I believe I am fairly acquainted with the value of lands in this vicinity.

Q. Were you acquainted with the fair market value of the south half of the south-east quarter of section 16, T. 22, R. 2 east of the 6th P.M., before the building of the railroad?

A. How long ago?

Q. Immediately before, were you acquainted with the fair market value of that land?

A. I believe I was.

Q. What would be the fair market value of that piece of land before that road was built?

A. About ten or eleven dollars an acre.

Q. How much would that eighty acres of land be worth—not by the acre, but the entire piece, together—before the road was built?

A. About eight hundred and fifty dollars, in my judgment.

Q. What was the fair market value of that piece of land immediately after the railroad had been completed through it?

A. I should not think that it would sell for more than eight dollars an acre.

Q. What was the entire tract worth immediately after the railroad was completed through it, exclusive of what they took?

A. I would have to base my opinion in regard to the value of that in consideration of the course the road takes.

Q. What I want to get at is, the fair market value of the tract at that time, taking everything into consideration.

A. I should think the remainder of the land would be worth at least, or about, six hundred and forty dollars.

And in the other case J. R. Layton, the first witness after Lamb himself, gave the following on his examination-in-chief on the question of damages:

Q. Are you acquainted with the value of lands in Stanton county?

A. To some extent, I am.

Q. Do you know the value of the piece of land in controversy, that is, the south half of the south-east quarter 34, 24, 3 east, before the railroad company built across it?

A. Well, I don't know that I would put it over from sixteen to eighteen hundred dollars.

Q. Do you know what the reasonable market value of the land was? Answer whether you know that fact.

A. I believe I do.

Q. What was it worth before the railroad company built across it?

A. From fifteen to eighteen hundred dollars.

Q. What was it worth after the railroad company built across it?

A. I should not consider it worth over five hundred dollars.

Q. You have examined the piece of land, have you, and know how the road runs through it?

A. Yes, sir. I have made no particular examination for that purpose though.

Q. You know how the railroad runs across it?

A. Yes, sir.

From what is here given, which is the entire testimony in chief of these two witnesses on the question of damages, and a fair sample of that of all the others, it will be seen that the province of the jury was directly invaded, and the damages estimated by the witnesses in accordance with their own peculiar notions of what caused them. The quantity of land taken in one case was about five acres, worth in the aggregate not to exceed sixty dollars, and in the other six and a half acres, worth not more than a hundred and sixty dollars; yet, according to the several estimates of these witnesses, and with no fact or circumstance beyond the taking of the land stated, the jury were told that the damage done to one tract was two hundred and ten dollars, and in the other from ten to thirteen hundred dollars, the estimated decrease in value in consequence of the road. And this is the character of much of the testimony the jury were specially charged to weigh in making up their verdict.

Damages incident to the taking of land for right of way for a railroad, and for which compensation must be made to the owner, independently of the portion actually appropriated, are the result of facts and circumstances susceptible of proof, and they must be proved before the damages are allowed. If the value of the residue of these two tracts were so greatly re-

duced by reason of the road, this result was for the jury to determine, not from the opinions of the witnesses, but from the legitimate facts and circumstances properly brought to their notice. And the use of witnesses in such a trial is to acquaint the court and jury with these facts and circumstances, but not to measure their effect.

As in Whalen's case above referred to, the cross-examination of witnesses disclosed the fact that some of their estimates were, in part at least, based upon facts and suppositions foreign to the issues, and which ought to have been excluded from the consideration of the jury, such as the presumed inadequacy of a culvert, injuries to property, want of track crossings, etc.

By the law of this state railroad companies are required to fence their track against stock running at large, and, failing to do so, are liable to the owner of any that may be killed or injured in consequence of this omission of duty. Sec. 2, Art. 1, Ch. 72, Comp. Statutes. And when requested by the owner of land crossed by the road they are required to make and keep in good repair one crossway, or other adequate means of crossing the track. Sec. 106, Ch. 16, Comp. Statutes. The want of means for crossing the road, and the watching of cattle to keep them from the danger of passing trains, therefore, being provided for, have no proper place in a trial of the question of damages for the right of way.

For manifest errors in the admission of testimony, as well as in the instructions to the jury, which are pointed out in Whalen's case, the judgment must be reversed and a new trial awarded.

REVERSED AND REMANDED.

THE FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD
COMPANY, PLAINTIFF IN ERROR, v. LYDIA A. WARD,
DEFENDANT IN ERROR.

Right of Way: DAMAGES. Case examined and found to fall within the rules expressed in the case of this plaintiff in error v. Whalen, *ante* 585. For want of testimony to warrant the verdict and for erroneous instructions to the jury, judgment reversed.

ERROR to the district court for Stanton county.

Joy & Wright, for plaintiff in error.

H. C. Brome and *John A. Ehrhardt*, for defendant in error.

BY THE COURT.

This case presents no questions not already fully considered during this term of the court in the case of this plaintiff in error v. Whalen, *ante* p. 585. The mode of estimating damages and the several instructions to the jury were precisely the same as in that case, and in the two other cases of the same company against Lamb, *ante* p. 592. It is unnecessary, therefore, to say more than that for errors precisely similar to those pointed out in those cases, there must be a new trial in this one.

However, as showing the paucity of evidence on which, under the instructions of the court, damages to the amount of five hundred dollars were found by the jury, we will add that, in addition to the opinion of witnesses called by the defendant in error as to the value of the lot before and after the location of the road, she produced no testimony whatever. The property in question is a lot in the town of Stanton. This

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much the jury were told, but they were not advised of the quantity taken, nor of the situation of what remained. The nearest approach to information of this description is made in the cross-examination of the witness H. C. Davis, wherein he says that the road took "off a corner on the south-east part of the land."

For the reason that there was no legitimate testimony to warrant the verdict, and for errors in the instructions to the jury, pointed out in the case against Whalen above referred to, the judgment must be reversed and a new trial awarded.

REVERSED AND REMANDED.

SARAH J. PALMER AND GILBERT C. PALMER, PLAINTIFFS
IN ERROR, V. ROBERT H. MAXWELL, DEFENDANT IN
ERROR.

Partnership: LIABILITY OF WIFE OF DECEASED PARTNER. Petition alleges the sale on credit and delivery by plaintiffs assignor of goods to the firm of P. & Son, of which firm the defendant, G. C. P., was a member. That afterwards the other member of said firm, B. C. P., died, leaving the defendant, S. J. P., his widow, and the defendant G. C. P. sole surviving partner. That defendants took possession of the property and estate of said B. C. P., deceased, and made it their own, and took upon themselves the authority to settle the estate of said B. C. P., and made distribution and appropriation of said estate without any valid appointment as administrator by either of them, etc. *Held*, to state no cause of action against S. J. P.

ERROR to the district court for Antelope county.
Tried below before BARNES, J.

W. S. Geer and N. D. Jackson, for plaintiffs in error,
cited *Carrere v. Spafford*, 46 How. Pr., 294. *Richter v.*

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Poppenhausen, 42 N. Y., 373. *Higgins v. Freeman*, 2 Duer., 650. *Dubois Case*, 3 Abb. Pr., 177. *Voorhis v. Childs Ex.*, 17 N. Y., 354.

M. McLaughlin and *C. C. McNish*, for defendant in error, cited *Carr v. Catlin*, 13 Kans., 394. *Sumner v. Powell*, 2 Mer., 37. *Camp v. Grant*, 21 Conn., 41.

COBB, J.

This was an action at law. The petition alleges that the assignor of the plaintiff sold and delivered certain goods, wares, and merchandise, as per bill of particulars, to Palmer & Son, a mercantile firm consisting of B. C. Palmer and the defendant, Gilbert C. Palmer. That before the commencement of the suit B. C. Palmer died, leaving the defendant, Sarah J. Palmer, his widow, and the defendant, Gilbert C. Palmer, his sole surviving partner. That thereupon the defendants took possession of the property and estate of the said B. C. Palmer, deceased, and made it their own, and took upon themselves the authority to settle the estate of said deceased, and made distribution and appropriation of said estate without legal appointment as administrators, etc.

Upon the state of facts presented by this petition, as we understand the law, and as it seems to be well settled by the authorities cited by counsel for the plaintiffs in error, the only person amenable to an action at law thereon is the defendant, Gilbert C. Palmer. His liability is an original one and depends in no degree upon his conversion of the property either of the partnership or that of the deceased member of the late firm. It is not deemed necessary here to inquire under what circumstances an action in the nature of a bill in equity will lie to subject the individual estate of a deceased partner to the payment of the debts of the firm, yet it may

not be amiss to refer to that well-known elementary proposition, lying at the very foundation of equity jurisdiction, that a party must first exhaust his legal remedies, or be without any adequate remedy at law, before he can resort to a court of equity. Even were this case claimed to be one of equity, the petition contains none of the allegations necessary to bring it within the above rule.

Viewing this action as a purely legal one, as we are compelled to do, it is obvious that no cause of action is alleged in the petition against the defendant, Sarah J. Palmer, as she could in any event only be held liable in equity.

Had the defendant, Gilbert C. Palmer, either alone or together with his co-defendant, demurred to the petition on the ground that several causes of action were improperly joined, he would probably have been entitled to judgment thereon. But he did not demur, but on the contrary answered as follows:

1. That he was not a party to the transaction or contract between the Sherwood School Furnishing Company and Palmer & Son, as set up in the plaintiff's petition.

2. That the said transaction and liability incurred thereby was outside of the partnership business, that he was not consulted, nor did he give his advice or consent in the contract.

3. That he denies each and every allegation set up in the petition, so far as they relate to himself, concerning the settlement of the estate of B. C. Palmer.

It will thus be seen that the defendant, Gilbert C. Palmer, denies none of the material allegations of the petition. So that while it probably was not the intention of the plaintiff to sue him as surviving partner of B. C. Palmer & Son, yet, as the petition contains all the necessary allegations for that purpose, none of

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which were denied by him, the plaintiff was entitled to judgment as against him on the papers. It therefore becomes unnecessary to examine the alleged errors as to the admission and rejection of evidence or the instructions given or refused.

The judgment of the district court is therefore affirmed as to the defendant, Gilbert C. Palmer, and reversed, with costs, as to the defendant Sarah J. Palmer.

JUDGMENT ACCORDINGLY.

CATHARINE BEHR, PLAINTIFF IN ERROR, v. DELANE A. WILLARD, GEORGE E. WILLARD, WILLIAM H. ROBERTSON, JOHN BEHR, CHARLES S. BARNES, AND ALMINA M. ROBERTSON, DEFENDANTS IN ERROR.

1. **Organization of Counties.** Upon the holding of an election for county and precinct officers, pursuant to the call of the special commissioners appointed by the governor for the purpose of organizing a new county, and the canvassing of the votes cast at such election by such special commissioners, such county "is permanently organized according to law."
2. **Specific Performance.** Action to compel the specific performance of a contract for the conveyance of real property. R. and J. B. agreed with C. B. to purchase certain real property from W. & W., in consideration of C. B. advancing money to pay for the said property, and to erect a house thereon. R. and J. B. agreed to take the contract of purchase in the name of C. B., and allow her to hold the same as security, and that R. and J. B. would repay her the amount of such advances and interest. C. B. advanced the money accordingly, but R. fraudulently took the contract in the names of R. and J. B., and by fraudulently erasing the name of J. B. therefrom assigned the same to one C., who assigned the same to A. M. R., who assigned the same to C. S. B., all of whom had notice. Suit by C. B., plaintiff, to compel specific performance of the contract as it should have been drawn, and to reform contract. *Held*, That J. B. was a necessary party defendant.

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ERROR to the district court for Platte county. The action there was to compel the specific performance of a contract for the sale of real estate situated in Genoa, Nance county. The defendants moved to dismiss the cause for want of jurisdiction, on the hearing of which it was stipulated that an election was held in Nance county, Nov. 4, 1879, for the purpose of electing certain county and precinct officers, who duly received certificates of election, and at the trial of this cause at the October term, 1880, were in full possession and discharging the duty of their respective offices; that there was not then and never had been a district court or court of general jurisdiction established by law or otherwise in Nance county; that all the defendants except John Behr, at the commencement of suit, July 15, 1880, resided in Nance county, and were duly served with process; and that plaintiff and John Behr resided in Platte county, where the action was brought. The motion to dismiss was sustained and judgment rendered against plaintiff. Other facts, necessary to a further understanding of the case, appear in the opinion.

W. S. Geer, for plaintiff in error.

Theo. F. Elliott and *George G. Bowman*, for defendants in error.

COBB, J.

The territory now embraced in the county of Nance was, until about the year 1878, an Indian reservation of the United States, and not within any county of the state. About that time the Indian tribe for whose benefit such territory had been reserved was removed therefrom by federal authority, and the lands embraced in said reservation brought into market by act of congress. Federal authority being thus withdrawn, the

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said territory fell fully within the provisions of the act of 1873, Gen. Stat., 248, which are: "All counties which have not been organized in the manner provided by law, or any unorganized territory in the state, shall be attached to the nearest organized county directly east for election, judicial, and revenue purposes

* * * If two or more organized counties or portions thereof lie directly east of any unorganized county, then the portions of territory of such unorganized county which lie either north or south of a line running directly west and in continuation of the boundary line between such organized counties, shall be attached to the organized county directly east of such territory for all purposes of this subdivision."

Under these provisions, that portion of said territory embracing the real estate involved in this action was, for the purposes named, attached to Platte county, while the south portion of said territory was attached to Polk county. Thus the matter stood when the act of Feb. 13, 1879, was passed. [Laws 1879, 148. Comp. Stat., sec. 46, chap. 17 and note.] An examination of that act, together with the provisions of law hereinbefore quoted, cannot fail to satisfy any one that in its passage the legislature had two objects in view, and those only, to-wit: to name the new county, and to detach the southern portion from its temporary connection with Polk county and attach it to the county of Merrick. The latter clause of the act, which provides that the two portions of the new county should remain attached to the counties of Merrick and Platte respectively, "until the officers shall have been elected and the said county permanently organized according to law," simply declares the law as it then stood. So far as that portion of said county which is of interest to this case is concerned, it was not affected in the remotest degree by the passage of said act, except in re-

spect to the name of the new county. And by reference to the law according to which said county must be organized, we find that the canvassing of the votes cast at the election for county officers called by the special commissioners, is the last act in the function of organization—the county is thenceforth permanently organized according to law. The sentence last quoted was intended by the legislature to mean precisely as though it read, “until the officers shall have been elected, and the said county thus permanently organized.” We fully recognize the rule of construction which, if possible, gives some meaning and purpose to every word of a statute, but to give to every superfluous sentence or repetition in language a volume of meaning would be quite as mischievous as to leave important provisions unconsidered.

Our attention is called to another act approved the same day as the act above referred to entitled “An act to appropriate money and applying the same in payment of the expenses of carrying on the prosecution of desperate criminal cases” [Laws 1879, 394], and also to another act approved a few days later “to authorize the judge of the district court to designate the county where an indictment may be found, and the person tried for any felonious offense charged to have been committed in any unorganized county or territory in this state, or in any county where no district courts are held,” etc. [Laws 1879, 62.] The best consideration that we have been able to give this act, as well as the other contemporaneous matters to which the attention of the court is called by counsel, lead to conclusions quite the contrary of those urged by him. This act, as well in the title as in the first section, clearly recognizes the fact that there were *organized* counties in this state where no terms of the district court are held. And it leaves no room for doubt that

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the legislature, in full view of such state of things, sought to remedy it by means which could only be sustained, if at all, by reasoning the very reverse of that which we are urged to follow in this case. So that neither from the terms of the act under consideration nor those of other acts then before the legislature, nor any contemporaneous fact or circumstance do we find any reason to doubt that it was the intention of the legislature that, upon the election of county officers and the canvassing of the votes cast at such election, by the special commissioners appointed by the governor, Nance county should take her place among the fully and permanently organized counties of the state.

Plaintiff in error presents another point. One of the defendants, John Behr, was a resident of Platte county where the action was brought. The statute, sec. 58 of the civil code, provides as follows: "An action to compel the specific performance of a contract of sale of real estate may be brought in the county where the defendants or any of them reside." It will not be contended that a plaintiff can give a court jurisdiction of a given case by adding the name of an unnecessary party as defendant. It will therefore be necessary for us to examine the petition and see whether, as the case is therein presented, John Behr is a proper defendant. If he is then the action was properly brought in Platte county without regard to the question of the organization of the county of Nance.

In and by the said petition the said plaintiff charges that the defendants, William H. Robertson and John Behr, on or about the 10th day of November, 1879, purchased of the defendants, the Willards, twenty-two feet of lot four in block twenty-one in Genoa, Nance county, for the sum of forty dollars, ten dollars of

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which sum was paid down, and the balance of thirty dollars to be paid on or before the 15th day of July, 1880. That before and at the time of said purchase it was agreed by and between the plaintiff on the one part, and the defendants, John Behr and W. H. Robertson, on the other part, that the plaintiff would advance and furnish to the said defendants money sufficient to pay for the said lot and to erect thereon a two-story building for a store with dwelling in the upper story, and that they, the said defendants, would take the contract from the defendants, the Willards, to and in the name of her, the said plaintiff, and she to hold and control the same until the defendants, W. H. Robertson and Behr, should repay to her all money by her advanced and interest thereon, and thereupon was to convey the said property to said defendants, Wm. H. Robertson and Behr. That in consideration thereof the said plaintiff advanced to the said defendants, Wm. H. Robertson and Behr, the said sum of ten dollars wherewith to make the said first payment, directing that they should see to having the papers made out as above set out and according to the agreement aforesaid. That the said last named defendants, having reported to the plaintiff that they had taken said contract for said real estate from the said Willards to the plaintiff, and she, relying upon the truth of such statement, advanced from time to time, under her said promise and agreement, the sum of five hundred and eighty dollars to construct said building on said lot, which said building was so constructed and erected on said lot, and is of the value of five hundred dollars, and said defendants, Robertson and Behr, went into possession thereof and continued therein until the 21st of April, 1880. That on said date the plaintiff and the defendants, Wm. H. Robertson and Behr, settled as well in respect to the said moneys advanced by her

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for the purchase of said real estate and the erection of said building thereon as in respect to other large sums of money advanced by plaintiff to the said last mentioned defendants outside of said first mentioned transaction, and in consideration of the money invested as aforesaid under said contract and otherwise advanced, said Robertson and Behr surrendered to the plaintiff all interest in said premises and said building and said lot together with an interest in certain other property. That the building was mentioned in said contract of surrender, and by mistake it was described as being on lot four in block seventeen, in said village of Genoa, but it ought and was intended to have been described as lot four, block twenty-one of said village, and thereupon the said Wm. H. Robertson and Behr delivered to the plaintiff the possession of the said house and lot, and that she has ever since continued in possession and is now in actual possession thereof. That at the time of said surrender the defendant, Wm. H. Robertson, told the plaintiff that as she had the title by contract there was no need of mentioning the lot in said surrender, that all she would have to do to complete her title thereto was to pay the thirty dollars remaining unpaid to said defendants, the Willards, and she would get the deed from them, and the plaintiff being ignorant of business matters, relied on the same. That at the time of said surrender and delivery of possession to the plaintiff of said premises, said Wm. H. Robertson fraudulently concealed and withheld the written contract of purchase made with the defendants, the Willards, for the purchase of said lot.

That she is now informed and believes, and so charges, that said Robertson took the contract in the first instance in the name of himself, the said William H. Robertson, and the said John Behr, in violation of said agreement had and made as aforesaid, intending

to defraud the plaintiff from the beginning, and fraudulently concealed said fact from the plaintiff. That after the said settlement made on or about the 21st of April, 1880, and after the plaintiff went into the possession of the said premises, the said Robertson, or some one in his behalf, fraudulently altered said contract and erased therefrom the name of said John Behr, and thereupon fraudulently assigned the same to one E. V. Clark, and said Clark again assigned said land contract to the defendant, Almina M. Robertson, wife of said William H. Robertson, and that soon thereafter said Almina M. Robertson fraudulently assigned said land contract to said defendant, C. S. Barnes. She charges actual knowledge of plaintiff's rights in the premises upon said Clark, Barnes, and Almina M. Robertson. That by the terms of said contract the balance of said purchase money is now due to the said Willards, which amount was to be paid on or before July 15, 1880, and she is ready to pay said amount as may be due to said Willards. That she has tendered the same, kept her tender good, and now brings the money into court, etc.

To the case made by this petition, John Behr is not only a proper but a necessary party defendant, and no proper decree could be rendered in the case without his presence. The petition charges that the original contract was made for the joint benefit of the said John Behr and W. H. Robertson, that it was to have been made in form to the plaintiff, to be held by her as a security. That the same was nevertheless fraudulently executed, in fact, to said John Behr and Robertson. Such being the case, the court could not decree the plaintiff to be the equitable owner of said contract, and entitled to enforce its specific performance against the Willards, without the presence in the suit of all the opponent parties thereto.

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The judgment of the district court dismissing said cause is therefore reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

JOHN SMITH, APPELLANT, v. GURDON J. MILLARD,
CHARLES CLUTZ, A. T. ASH, AND SAMUEL ALEX-
ANDER, APPELLEES.

Real Property: TITLE: EQUITY. M. entered a tract of land at the U. S. land office, and received the usual certificate of entry therefor. On the same day, for value, he assigned the said certificate and the land therein described to C. and his heirs and assigns forever, by writing on the back of said certificate, which assignment was duly signed, witnessed, acknowledged, and recorded. Afterwards, M. executed a mortgage to C. of same land, to secure a note for \$800. Afterwards, and after the maturity of said note, C. entered into possession of said tract of land, claiming title under the said assignment of said certificate. While in such possession, C. mortgaged said land to D. M. S. & Co., to secure payment of a note for about \$1,000. Afterwards, C. sold and endorsed the note of M. for \$800 to the plaintiff S. The mortgage of C. to D. M. S. & Co. was foreclosed, the land sold thereon, and bought in by defendants A. and A. On action brought by S., plaintiff, to foreclose the first mentioned mortgage, *Held*, that as to defendants A. and A., plaintiff had no standing in a court of equity, and the decree of the district court dismissing the cause affirmed.

APPEAL from Adams county. Tried below before GASLIN, J.

Batty & Ragan, for appellant.

Grantor having final receiver's receipt can make a valid mortgage. 5 Neb., 261. Mortgagee's mortgage conveys no interest in realty. 2 Wash., 114. 17 Wis.,

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212. 9 Cal., 426. 36 New York, 44. Assignment of patent conveys no title. 10 Kan., 85. Assignment of contract of public lands is no conveyance of fee. 49 Cal., 398. 12 Wis., 644. 35 Mich., 100. 28 Tex., 150.

Hewett & Yocum, for appellees Ash and Alexander.

Assignment of certificate by Millard to Clutz, with possession, conveyed all right and title of Millard, and subsequent mortgage between same parties was a nullity. Gen. Stat., 872. *Lillyman v. King*, 36 Iowa, 208. *Carroll v. Safford*, 3 Howard, 341. 3 Washburn on Real Property, chap. 8. Clutz took land in payment of debt for which mortgage was given. This canceled mortgage before the one to Steele & Co. was made. 2 Wash. on Real property, 562. See also 15 Ohio, 408. 7 Ohio State, 281. 1 Greenleaf on Ev., 28.

COBB, J.

This action was brought to foreclose a mortgage executed by Gurdon J. Millard to Charles Clutz on a certain quarter section of land in Adams county, on the twenty-second day of July, 1873, to secure the payment of a note for \$800, due August 15, 1878. Plaintiff claims as endorsee and holder of the note. The defendants, other than Millard and Clutz, were made such upon their own motion as subsequent purchasers and owners of the land.

The material facts, as proved at the trial and found by the district court, are substantially as follows:

1. That on the fourteenth day of January, 1873, the defendant Millard entered at the United States land office the tract of land in question, and received a certificate of entry and purchase thereof in the usual form, and on the same day, by an assignment in writing on

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the back thereof, duly executed, witnessed, and acknowledged before a proper officer, for value received, sold, assigned, and transferred the said certificate and the land therein described, to Charles Clutz and to his heirs and assigns forever, and authorized him to receive a patent therefor. This certificate, with the said assignment thereon, was at the same time delivered to Clutz by Millard, and kept by him, and on the twenty-first day of September, 1875, he caused the same to be recorded in the office of the register of deeds of Adams county. That on the twenty-second day of July, 1878, Millard executed and delivered to Clutz the mortgage set up in the plaintiff's petition, on the same land, to secure a promissory note executed at the same time for the sum of \$800, due Aug. 15, 1878.

2. That Millard afterwards received from the government a patent to said land upon its purchase as evidenced by the said certificate.

3. That said Clutz, before the twenty-fourth day of February, 1876, and after the said note became due, entered into possession of said land, and claimed possession and ownership thereof, under and by virtue of the purchase thereof, as evidenced by the said assignment of and transfer upon the back of the said certificate of purchase and entry.

4. That on the said 24th day of February, 1876, the said note and mortgage were in the possession of said Clutz, and on the last mentioned day, he, the said Clutz, mortgaged said land to D. M. Steele & Co., to secure the payment of his promissory note for \$994.00.

5. That default was made in the payment of said last mentioned note. An action was commenced, and judgment of foreclosure and sale rendered upon said note and mortgage by said district court of Adams county. A sale thereof by the sheriff of said county on such decree was made, and part of said land bought

at said sale by the defendant Ash and the other part by the defendant Samuel Alexander, and the sales duly confirmed by the said court. All of which was had and done before the commencement of this suit.

There were further findings of fact and of conclusions of law made by the district court, but which it is not deemed necessary to further notice for the purposes of this opinion.

The certificate, together with the assignment executed on its back, contained all of the elements of a deed of conveyance; and while as between Millard and Clutz it may have been, and probably was, intended as a mortgage, yet, as to third persons who had no actual notice or knowledge of the secret purpose of the parties, it was in the opinion of the writer a conveyance of the fee of the land. But without placing the opinion of the court upon ground which might be considered somewhat extreme, there can be no doubt that it at least conveyed an equitable estate in the land to Clutz, which, together with his right of possession, was capable of being mortgaged by him. While in the actual possession of the land and claiming title thereto under the said conveyance, Clutz executed the mortgage to D. M. Steele & Co. for a lawful consideration, which was received by them in good faith. After the foreclosure of such mortgage and the sale made to carry the same into effect, the defendants Ash and Alexander purchased the lands in good faith, relying upon Clutz's possession and claim of title, as well as the record of said certificate and the assignment thereof. Clearly, by such purchase and the sheriff's deed made by the order of the court, they took all the title which Clutz had in the land, equitable as well as legal. At the time of the execution of the mortgage by Clutz to D. M. Steele & Co., he held the note and mortgage of Millard upon which this suit is

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brought. The note was dishonored and long past due. He had entered into possession of the mortgaged premises and conveyed them away for a valuable consideration. Under these circumstances he sold and endorsed the note to Smith, the plaintiff, and the latter took it subject to all of its infirmities in the hands of Clutz. Had Clutz undertaken to foreclose said mortgage against D. M. Steele & Co., his own subsequent mortgagee of the same property, he would have been met by every principle of equity and justice, and as his endorsee of the dishonored note, Smith, the plaintiff, is equally without standing in a court of equity, as against the defendants Ash and Alexander.

The decree of the district court is affirmed.

DECREE AFFIRMED.

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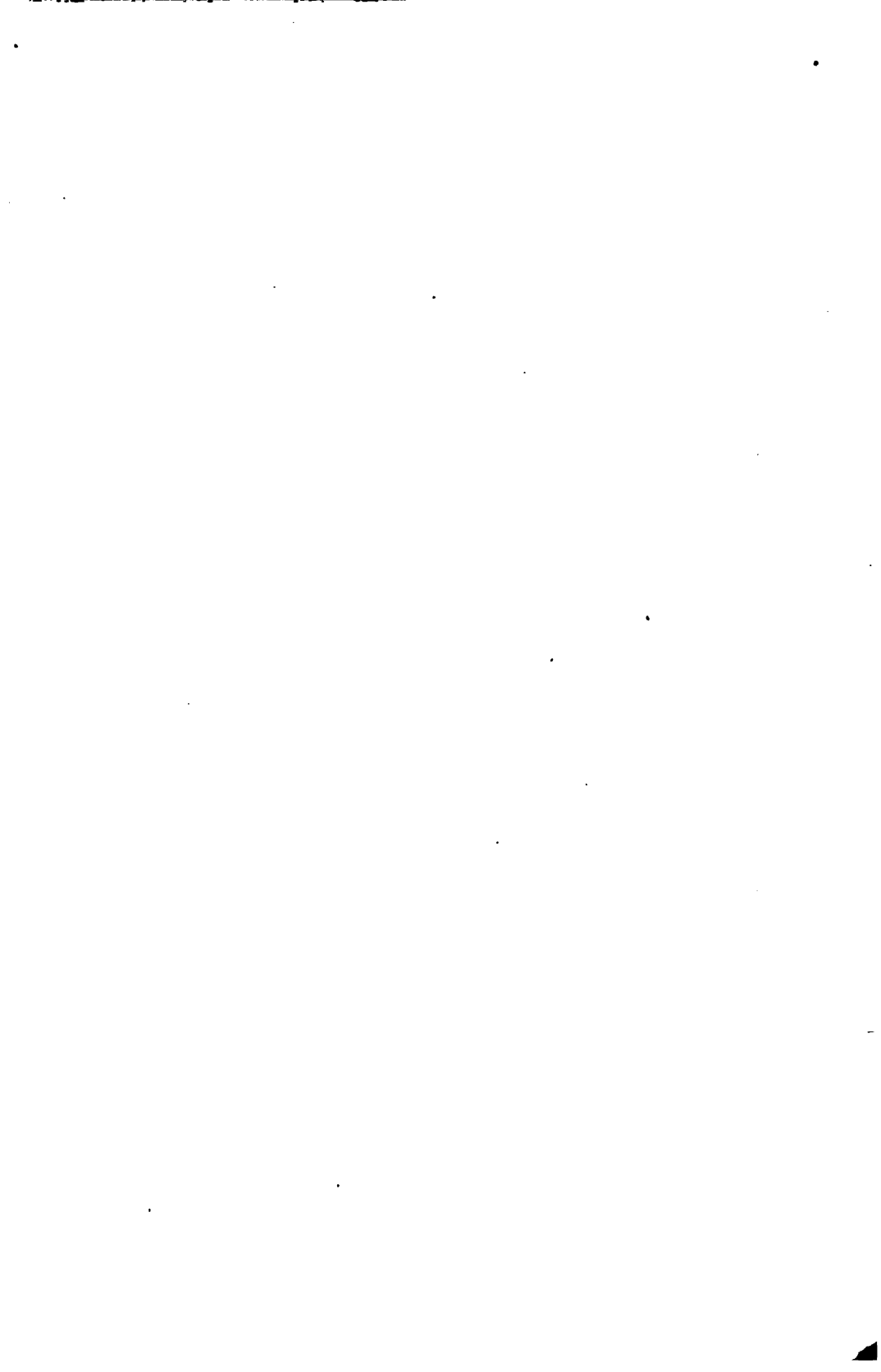
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